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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~269~~. 46

THE WASHINGTON GAS-LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 14, 1891.

(14,807.)

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1 *Declaration, &c.*

Filed March 25th, 1881.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
THE WASHINGTON GAS-LIGHT COMPANY, Defendant.
At Law. No. 22757.

The plaintiff, a body corporate under an act of Congress, sues the defendant, also a body corporate under an act of Congress, for that heretofore, to wit, on the sixteenth day of July, 1879, one Marietta M. Parker brought suit against the District of Columbia in the supreme court of said District, and for cause of action alleged that on the twelfth day of May, 1879, while carefully passing along the sidewalk of a certain street in the city of Washington known as C street northeast she stepped into an open gas box in sidewalk, by reason whereof she suffered great injury to her limb and health, to her damage twenty thousand dollars ($20,000), to which said suit the plaintiff plead and issue was made up; whereon and afterwards, to wit, on the sixth day of December, 1880, in said court,

2 said case came on for trial before one of the justices thereof and a jury and was duly tried, resulting in a verdict for said Parker for the sum of five thousand dollars ($5,000), with costs.

And the plaintiff says that said gas box was so as aforesaid placed and maintained in said street by the defendant, The Washington Gas-light Company, to whom said Parker complained of the injury, and made application for compensation for such injury, which was refused by said gas-light company; that upon the commencement of said suit by said Parker against the plaintiff the District caused due notice to be given to said Washington Gas-light Company of the commencement of said suit and the cause of action as herein stated, with the request that it appear and defend said suit, which it neglected to do, and also, after said verdict and within the rules of said court, the plaintiff notified said gas company of the result of said trial, and that the District would not further defend said case, and offered to the said gas-light company the use of its name for a further defense of said case by said gas-light company if it should

3 deem proper to defend the same, to which said notice no reply was made, and that afterwards, on the seventh day of December, 1880, said supreme court rendered judgment on said verdict in favor of said Parker for the sum of five thousand dollars ($5,000), with costs; which said proceedings in said case remain of record in said supreme court; which said judgment, together with $81.68 interest and $67.85 costs, amounting in all to the sum of $5,149.53, the said District of Columbia, on the fifteenth day of March, 1881, paid to said Parker.

And thereupon, by reason of the premises, a cause of action hath

accrued to said District of Columbia to have and maintain its suit against said Washington Gas-light Company to recover said sum, with interest and costs, amounting to the sum of $5,149.53, so paid as aforesaid by the plaintiff to said Parker; for which said sum of $5,149.53 the plaintiff asks for a judgment.

A. G. RIDDLE, *Att'y D. C.*

The defendant is to plead hereto on or before the first special term of the court occurring 20 days after service hereof; otherwise judgment. A. G. RIDDLE, *Att'y D. C.*

4 *Summons.*

Issued March 25th, 1891.

In the Supreme Court of the District of Columbia, the 25th Day of March, 1891.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
THE WASHINGTON GAS-LIGHT COMPANY, Defendant. } At Law. No. 22757.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its first special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why *he* should not have judgment against you for the cause of action stated in *his* declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
[SEAL.] By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

5 *Marshal's Return.*

1881, March 25th.—Summons returned. Endorsed: "Service accepted. W. B. Webb, att'y for gas Co."

Demurrer.

Filed May 3, 1881.

In the Supreme Court of the District of Columbia, the 3d Day of May, 1881.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

The defendant says the declaration of plaintiff in this case is bad in substance. W. B. WEBB, *For Def't.*

One of the matters of law intended to be argued in this case is that the plaintiff has not in its declaration set out any such matters or things, either express or implied, as shows that any liability is incurred on the part of the defendant to said plaintiff, or
6 that such liability in any way arose on account of the wrongs and injuries complained of therein.

W. B. WEBB, *For Def't.*

Motion for Judgment Notwithstanding Demurrer and Notice of Same.

Filed May 3, 1881.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

And now comes the plaintiff, The District of Columbia, and moves the court for judgment notwithstanding the demurrer heretofore filed by the defendant, and for reason says—

That the demurrer heretofore filed by it contains in the margin thereof no substantial matter of law intended to be argued thereon, but in lieu thereof a frivolous statement or repetition of the demurrer.

FRANCIS MILLER,
Attorney for Plaintiff.

7 Take notice that on Friday next, May 6th, 1881, at 10 o'clock a. m., or as soon thereafter as I can be heard, I shall move the court to grant the above motion.

FRANCIS MILLER,
Attorney for Plaintiff.

To W. B. Webb, att'y for def't.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, the 23d day, of January, A. D. 1882.

MONDAY, *January 23d*, 1882.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

8 SATURDAY, *March 4th, A. D.* 1882.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 99.

Upon hearing the plaintiff's motion for judgment notwithstanding the demurrer, it is considered that said motion be, and the same is hereby, overruled.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the fourth Monday, being the 22d day, of January, A. D. 1883.

MONDAY, *January* 22*d*, *A. D.* 1883.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

9 SATURDAY, *February* 17*th*, *A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 174.

Upon hearing the defendant's demurrer to the plaintiff's declaration, it is considered that said demurrer be, and the same is hereby, sustained, and on motion leave is granted the plaintiff to amend its declaration as it may be advised.

Amended Declaration, &c.

Filed Feb'y 27, 1883.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

10 And now comes the plaintiff, by leave of court first had and obtained, and amends its declaration so as to read as follows:

The plaintiff, a body corporate under an act of Congress, sues the defendant, also a body corporate under an act of Congress, for money payable by the defendant to the plaintiff, for that heretofore, to wit, on the 16th day of July, 1879, one Marietta M. Parker brought suit against the District of Columbia in the supreme court of said

District, said suit being numbered 20974 on the law docket of said court, and for cause of action alleged that on the twelfth day of May, 1879, while carefully passing along the sidewalk of a certain street in the city of Washington, in said District, known as C street northeast, she stepped into an open gas box in said sidewalk, by reason whereof she suffered great injury to her limb and health, to her damage twenty thousand dollars ($20,000); to which said suit the plaintiff herein pleaded and issue was made up; whereon and afterwards, to wit, on the sixth day of December, 1880, in said court said case came on for trial before one of the justices thereof and a jury and was duly tried, resulting in a verdict for said
11 Parker for the sum of five thousand dollars ($5,000), with costs; and this plaintiff says that said gas box was placed and maintained by the defendant in the sidewalk of said street for its own use and behoof, and it was its, the said Washington Gas-light Company's, duty to so maintain the same, that accident and injury should not accrue to any one therefrom; that, in disregard of its duty in the premises, it maintained the same in such a careless and negligent way that through its negligence said injury accrued to said Parker, who in the first instance applied to the defendant for compensation for her said injury, which was wrongfully refused by the defendant, The Washington Gas-light Company, and thereupon, as she might do, she commenced her said suit against the plaintiff, The District of Columbia; whereupon the District caused due notice to be given to said Washington Gas-light Company of the commencement of said suit and the cause of action as herein stated, with the request that it appear and defend said suit, which it neglected to do, and also, after said verdict and
12 within the rules of said court, the plaintiff notified said gas company of the result of said trial and that the District would not further defend said cause, and offered to the said gas-light company the use of its name for a further defense of said case by said gas-light company if it should deem proper to defend the same; to which said notice no reply was made; and that afterwards, on the seventh day of December, 1880, said supreme court rendered judgment on said verdict in favor of said Parker for the sum of five thousand dollars ($5,000), with costs; which said proceedings in said case remain of record in said supreme court; which said judgment has never been reversed nor appealed from, and the amount whereof, together with $81.68 interest and $67.85 costs, amounting in all to the sum of $5,149.53, the said District of Columbia on, to wit, the fifteenth day of March, 1881, paid to said Parker; and thereupon, by reason of the premises, a cause of action hath accrued to said District of Columbia to have and maintain its suit against said Washington Gas-light Company to recover said
13 sum, with interest and costs, amounting to the sum of $5,149.53, so paid as aforesaid by the plaintiff to said Parker; to which said sum of $5,149.53, with interest thereon from, to wit, March 15th, 1881, and costs the plaintiff asks judgment.

A. G. RIDDLE,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

A. G. RIDDLE,
Attorney for Plaintiff.

Pleas.

Filed April 3, 1883.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT CO. } At Law. No. 22757.

The defendant, by W. B. Webb and W. D. Davidge, its attorneys, comes and defends the wrong and injury when, &c., and says
14 that it is not guilty of the said supposed trespasses above laid to its charge or any or either of them in manner and form as the said plaintiff hath above complained against it.

And for a further plea defendant says that it is a corporation duly incorporated by an act of Congress entitled An act to incorporate the Washington Gas-light Company, approved July 8th, 1848, and in and by said act of incorporation invested with full power and authority to manufacture and sell gas to be used for the purpose of lighting the city of Washington or the streets thereof and any buildings, manufactories, or houses therein contained and situated, and to lay pipes for the purpose of conducting gas in any of the streets, avenues, and alleys of said city, subject to such conditions and in compliance with such regulations as the corporation of Washington should from time to time prescribe; that by an ordinance passed by the board of alderman and common council and approved by the mayor of said city of Washington on the 17th day of March, 1866, the said corporation of Washington did ordain and prescribe that it should be the duty of the owners
15 or agents or occupants of lots or parcels of lots or subdivisional lots in the said city of Washington, before the street or carriage-way was paved, to provide and properly lay gas-service pipes of one-inch wrought-iron pipe from the main pipe in said street to one foot inside of the curb line, with a one-inch gas cock and cast-iron box and cover inside the curb line; that under the said ordinance and in execution of the duty thereby imposed the said gas box on the sidewalk in the certain street in the city of Washington known as "C" street northeast, and into which, it is alleged, the said Marietta M. Parker stepped, was provided with a cast-iron gas box, to wit, the gas box mentioned and described, by the owner or agent or occupant of the lot fronting on said "C" street northeast, to wit, on the 8th day of August, 1873, at the county aforesaid; that the said service pipe so as aforesaid laid from the main pipe of the defendant to one foot inside the curb line and the said gas cock and cast iron box and cover provided inside the

curb line of the said "C" street northeast, in the said
16 city of Washington, were accepted by the said city of Washington, to wit, by plaintiff, as done and provided under and in accordance with and in execution of the said ordinance, and were, for a long time after the same were laid and provided as aforesaid, acquiesced in under the terms, conditions, and provisions of the said ordinance; that the said cast-iron gas box and cover so provided as aforesaid were incorporated into and became and were part of the said walk of the said street known as "C" street northeast, in the said city of Washington, and became subject to and under the sole control, care, and guardianship of the said corporation of Washington or the District of Columbia and its agents and officers; that the said ordinance of the city of Washington is, by the act of incorporation of the plaintiff, continued in full force and effect, and is binding upon said plaintiff and its agents and officers; that said cast-iron gas box and cover became and were incorporated into and became part of one of the public highways of plaintiff and under its care and control, and that it became and was the duty of said plaintiff to supervise, inspect, and care for such highways
17 and to keep the same free from incumbrances or defects, and that it was the further duty of the said plaintiff to notify the defendant of any defect in said gas box, and that no notice was ever given, either by plaintiff or by any other person or persons, to defendant of such defect in said gax box or cover; that the said sidewalk was, is, and has been always from and since the said 8th day of August, 1873, under the sole and special care, supervision, management, and control of the said plaintiff as the successor of the said corporation of Washington and its agents and officers, and was under the said control, management, and supervision of the said plaintiff and its agents and officers on the 12th day of May, 1879, and has at no time been and was not on the said 12th day of May, 1879, in the charge of or subject to the care, management, supervision, or control of the defendant or its officers or agents; without this, that it is the duty of the defendant to maintain the said gas box in such manner that accident and injury should not accrue to any one therefrom.

And for a further plea defendant says that the gas-service pipes leading from the main pipe of defendant to the sidewalk of "C" street northeast, in the said city of Washington, was, under
18 the direction and the order and the procurement of the plaintiff, its officers and agents, laid of one-inch wrought-iron pipe from the said main to one foot inside of the curb line of the said sidewalk and was furnished with a one-inch gas cock and cast-iron box and cover inside the said curb line of said sidewalk, and that the said gas cock and cast-iron box and cover were not on the 12th day of May, 1879, nor at any other time before or since the said date the property of the defendant or subject to its management, regulation, care, or control; and defendant has not at any time had notice by or from or on behalf of said plaintiff or any of its officers or agents that the said cast-iron box and cover were

being so maintained or were in such condition that accident might accrue therefrom to any one.

And for a further plea defendant says that the issue tried in the suit specifically referred to and set out in the plaintiff's declaration involved only the primary responsibility of the plaintiff in the action to the plaintiff in the suit so set forth and referred to
19 in plaintiff's declaration in this action and did not involve the duty of the defendant to supervise or care for the said cast-iron gas box and cover after the same had been accepted by and taken under the charge, care, and control of the plaintiff in this action or to keep the same in good condition and order except after due notice nor any negligence on the part of defendant in respect to the condition of the cast-iron gas box or cover, to wit, the gas box aforesaid.

W. B. WEBB,
W. D. DAVIDGE,
Att'ys for Def't.

Joinder in Issue upon Def't's 1st Plea and Demurrer to 2d, 3d, and 4th Pleas.

Filed Nov. 6, 1883.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

1. The plaintiff joins issue upon the defendant's first plea.
20 2. The plaintiff says that the defendant's second, third, and fourth pleas are bad in substance.

A. G. RIDDLE,
Att'y for Plaintiff.

NOTE.—Among the matters of law intended to be argued in support of the above demurrer are the following:

1. Said second, third, and fourth pleas do not nor does either of them set up anything which relieves the defendant from the care of said gas box and cover in question or from responsibility for defect of same.

2. Said defendant was not entitled to notice of the defect of said gas box from the plaintiff.

Court Proceedings.

Proceedings before the supreme court of the *supreme court of the* District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, it being the 28th day, of January, A. D. 1884.

MONDAY, *January 28th, A. D.* 1884.

21 By order of Alexander B. Hagner, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

TUESDAY, *May 6th, A. D.* 1884.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT COMPANY, Def't. } At Law. No. 22757.

Now again come here the parties aforesaid in manner aforesaid, and the court being fully advised in the matter of the plaintiff's demurrer to defendant's second, third, and fourth pleas, which has been argued and submitted, it is considered that said demurrer be, and the same is hereby, sustained, and, on motion, leave is granted the defendant to amend *his* pleas and plead further.

22 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing the third Monday, it being the 20th day, of October, A. D. 1884.

MONDAY, *October 20th, A. D.* 1884.

By order of Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT COMPANY, Def't. } At Law. No. 22757, Cal. 53.

Ordered, this 11th of November, 1884, that the defendant have until the 20th of this month to plead anew, and that after issue joined the cause shall stand for trial at this term.

A. B. HAGNER.

23 *Pleas to Amended Declaration.*

Filed Nov. 20, 1884.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

The defendant, by W. B. Webb and W. D. Davidge, its attorneys, for plea to plaintiff's amended declaration, leave of the court therefor being first had and obtained, says that it was not bound to keep in repair the said gas box, as in declaration alleged, and that said duty on its part was not adjudicated in the alleged suit, nor was the same tried or litigated thereon, nor was the defendant a party or privy to the said case nor bound thereby.

And for a further plea says that the said gas box was not out of repair, as alleged.

W. B. WEBB,
W. D. DAVIDGE,
For Defendant.

24 *Plaintiff's Demurrer to Defendant's Pleas to Its Amended Declaration.*

Filed Dec. 2, 1884.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT CO. } At Law. No. 22757.

The plaintiff says that the defendant's pleas to its amended declaration are bad in substance.

A. G. RIDDLE,
Attorney for Plaintiff.

NOTE.—Among the matters of law intended to be argued in support of the above demurrer are the following:

1. That the first plea filed by the defendant is bad for duplicity.
2. That the matters and things set up in the defendant's second plea cannot be availed of by it as a matter of defense in this action.
3. That the defendant is estopped from setting up the matters and things in its second plea set out as defense by reason of the judgment in the case of Parker *vs.* The District, referred to in the declaration in this suit.

25 *Stipulation of Counsel as to Defence.*

Filed April 25, 1885.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

It is hereby stipulated and agreed by counsel in the above-entitled case that any matter of defense to which the defendant is entitled may be given in evidence under the general issue plea.

A. G. RIDDLE,
Att'y D. C.
W. B. WEBB &
W. D. DAVIDGE,
For Defendant.

Order to Enter Appearance for Defendant.

Filed Nov. 5, 1885.

Sup. Court D. C.

DIST. OF COLUMBIA
vs.
WASH'N GAS-LIGHT CO. } Law. 22757.

26 The clerk will please enter my appearance for the defendant in the above cause.

ENOCH TOTTEN,
Att'y for Def't.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term at law and circuit court in and for said District, commencing the fourth Monday, it being the 25th day, of January, A. D. 1886.

MONDAY, *January 25th, A. D.* 1886.

By order of Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

THURSDAY, *February 4th*, 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

27 THE DISTRICT OF COLUMBIA, Pl'ff, vs. THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 41.

Now comes here the plaintiff, by its attorney, Mr. Riddle, and, on motion, leave is granted it to amend its declaration as it may be advised.

Amended Declaration.

Filed Sept. 29, 1886.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, Plaintiff, vs. THE WASHINGTON GAS-LIGHT COMPANY, Defendant. } At Law. No. 22757.

Comes now the said plaintiff and, by leave of the court in that behalf first had and obtained, files this its amended declaration, and for cause of action says as follows:

The plaintiff, a body corporte under and by virtue of an act of Congress of the United States, sues the defendant, also a body corporate under and by virtue of an act of said Congress and
28 sundry amendments thereof, for money payable by the defendant to the plaintiff, for that heretofore, to wit, on the 16th day of July, A. D. 1879, one Marietta M. Parker brought her suit in this the supreme court of the District of Columbia against the plaintiff herein, the said cause being numbered 20974 on the law dockets of said court, and all the record and proceedings therein being hereby referred to and made part hereof as fully to all intents and purposes as though the same were herein at large set out; that for cause of action in her said suit the said Marietta M. Parker alleged that on, to wit, the 10th day of May, A. D. 1879, and for a long time prior thereto, there was a certain common and public highway in the city of Washington, in the District of Columbia, called C street northeast, which said highway the said plaintiff herein was bound to keep in such condition as to render it safe and convenient for passage and transit on and over the same, but that nevertheless the said plaintiff herein on, to wit, the said 10th day of May, A. D. 1879, wrongfully and negligently permitted the said public highway or street to be and remain out of repair and
29 in a dangerous condition without fixing or placing any warning or protection at or near a certain deep and dangerous hole in the sidewalk in said street to denote that the same was there and made no effort to warn persons passing along said public highway or street of the existence of said hole; in consequence of which the said Marietta M. Parker, while walking moderately and carefully along said street or highway, stepped her foot into said hole and was thrown down to and upon the ground and thereby sustained great bodily injuries, in the declaration in the said action more particularly described, and was put to great expense, to her

damage twenty thousand dollars; that the plaintiff herein duly pleaded to the declaration in the said cause numbered 20974, to wit, not guilty, and issue thereon was duly made up, and thereafter, on, to wit, the 6th day of December, A. D. 1880, the said cause duly came on for trial in the said court before one of the justices thereof and a jury and was duly tried, and verdict and judgment were therein rendered for the said Marietta M. Parker for the sum of five thousand dollars (5,000), with costs; that the said proceed-
30 ings in the said cause numbered 20974 remain of record in said supreme court of the District of Columbia, and the said judgment has never been removed or appealed from, and that the plaintiff herein on, to wit, the 15th day of March, A. D. 1881, duly satisfied the said judgment by paying to the said Marietta M. Parker the amount thereof, with interest, to wit, eighty-one (81) dollars and sixty-eight (68) cents, and costs, to wit, sixty-seven (67) dollars and eighty-five cents (85), amounting in all to the full sum of, to wit, five thousand one hundred and forty-nine (5,149) dollars and fifty-three (53) cents.

And the plaintiff says that on the trial of the said cause numbered 20974 aforesaid, to wit, the said cause so as aforesaid instituted by the said Marietta M. Parker, the said certain deep and dangerous hole in the said cause mentioned was approved by the said Marietta M. Parker to be, as in fact it was, a certain open gas box, so called, which on, to wit, the said 10th day of May, A. D. 1879, was placed and maintained in the said sidewalk and street aforesaid by the said defendant, The Washington Gas-light Company, for its own use, benefit, and behoof; that it was the
31 duty of the said defendant so to maintain the said gas box that accident or injury might not or should not happen or accrue thereby or therefrom to any one; but that the said defendant, not performing or regarding its duty in that behalf, wrongfully and negligently permitted and allowed the same to remain and be out of repair and in a dangerous and unsafe condition on, to wit, the said 10 day of May, A. D. 1879, by means and in consequence of which gross negligence and failure of the defendant to perform its said duty the said Marietta M. Parker stepped into the same and sustained said injury and damage as aforesaid, being the same injury and damage complained of by her in the said cause numbered 20974 aforesaid.

And the plaintiff further says that prior to the commencement of her said action by the said Marietta M. Parker aforesaid it, the plaintiff, duly notified the said defendant that by reason of her injury aforesaid she, the said Marietta M. Parker, had made claim for damages on account thereof against the plaintiff, and that it, the plaintiff, would look to the defendant to make good any
32 amount that the plaintiff might be called upon to pay on account of such claim; that of the said action by the said Marietta M. Parker, both before the same was brought and during its pendency and before the trial thereof and of the said trial itself, the said defendant otherwise had due and seasonable notice and full opportunity to defend the same and to participate in the de-

fence thereof, and that after the said verdict in favor of the said Marietta M. Parker and within the time limited by the rules of the said supreme court of the District of Columbia for moving for new trials the plaintiff notified the defendant of the result of the said trial aforesaid, and that it, the plaintiff, would not further defend the said cause numbered 20974, and offered to the said defendant the use of its, the said plaintiff's, name for a further defense of said cause by said defendant should it deem it proper to make the same, to which said notice the plaintiff received no reply.

Whereupon, by reason of the premises, a cause of action
33 hath accrued to the plaintiff against the defendant, and the plaintiff claims of the defendant the sum of five thousand one hundred and forty-nine (5,149) dollars and fifty-three (53) cents, with interest from the 15th day of March, A. D. 1881, besides costs, for which it accordingly asks judgment.

HENRY E. DAVIS,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

HENRY E. DAVIS,
Attorney for Plaintiff.

Plea to Amended Declaration.

Filed Oct. 12, 1886.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } Law. No. 22757.

And now comes the said defendant, The Washington Gas-
34 light Company, and says it never was indebted in manner and form as alleged in the amended declaration filed herein since the last continuance.

ENOCH TOTTEN,
Att'y for Def't.

Stipulation and Agreement.

Filed Oct. 13, 1886.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } Law. No. 22757.

It is hereby stipulated and agreed that the defendant may, under the general issue, avail itself of any defense it may have in the above cause.

HENRY E. DAVIS,
Att'y for Pl'ff.
—— ——, *Att'y for Def't.*

35 *Joinder in Issue.*

Filed Oct. 15, 1886.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. 22757.

And now comes the plaintiff and joins issue upon the defendant's plea to its amended declaration.

A. G. RIDDLE &
H. E. DAVIS,
Att'ys for Plaintiff.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, it being the 24th day, of January, A. D. 1887.

MONDAY, *January 24th, A. D.* 1887.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

36 TUESDAY, *March 8th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 6.

Now comes here as well the plaintiff, by its attorney, Mr. Riddle, as the defendant, by its attorneys, Messrs. Totten & Davidge, and a jury of good and lawful men of this District, to wit, William Cruikshank, Thomas D. Devine, William E. Brown, George P. Bohrer, William H. Johnson, Samuel C. Dickinson, Jacob D. Hutton, Jerome J. McManus, William D. Serrin, Joseph Williamson, Frederick A. Schneider, & John F. Douglas, who, being duly sworn to try the issue above joined, are respited until the meeting of the court tomorrow morning.

WEDNESDAY, *March 9th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

37 THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. 22757, Cal. 6.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

THURSDAY, *March 10th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 6.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

38 FRIDAY, *March 11th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 6.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court, Monday morning next.

MONDAY, *March 14th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757, Cal. 6.

39 Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited on Friday last, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff, and that the money payable to it by the defendant by reason of the premises is the sum of five thousand one hundred and forty-nine dollars and fifty-three cents, besides costs. Therefore it is considered that the plaintiff recover against said defendant five thousand one hundred and forty-nine dollars and fifty-three cents as aforesaid, being the money payable by the defendant to the plaintiff by reason of the premises, and $—— for its costs of suit, and have execution thereof.

WEDNESDAY, *March* 16, *A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE WASHINGTON GAS-LIGHT CO., Def't. } At Law. No. 22757.

40 And now comes the said defendant and moves the court for a new trial on exceptions, which motion is to be heard in the general term in the first instance.

W. D. DAVIDGE,
ENOCH TOTTEN,
Attorneys for Defendant.

Filed January 23, 1888.

And now comes here the defendant, by its said attorneys, and tenders to the court here its bills of exceptions to the rulings of the court on the trial of the case, and prays that they may be duly signed, sealed, and made a part of the record, which is done accordingly, now for then.

41 (Filed January 23d, 1888. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

Bill of Exceptions.

This cause came on for trial on the 8th day of March, 1887, and a jury having been duly sworn, the plaintiff, to maintain the issues on its part, gave evidence to the jury tending to show that on or about the 16th day of July, A. D. 1879, one Marietta M. Parker instituted an action at law against the District of Columbia, being law cause No. 20974 in this court, to recover twenty thousand dollars ($20,000) damages for injuries alleged to have been received on the public street known as C street northeast, near or opposite to No. 121 on that street, and thereupon, against the objection of the defendant, introduced the record and proceedings in the said cause, to wit: The declaration and rule to plead, the defendant's plea, the joinder of issue, and the record of the verdict and the judgment thereon in the said cause, each of which papers and records is in the words and figures following, to wit:

42 *Declaration.*

In the Supreme Court of the District of Columbia.

MARIETTA M. PARKER, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 20974.

The plaintiff sues the defendant for money due and payable by the defendant to the plaintiff for that whereas, on the date hereinafter mentioned, and for a long time prior thereto, there was and still is a certain common and public highway in the city of Washington, in the District of Columbia, called C street northeast, which was and is used as such highway by the good citizens of the United States for passing and repassing on and over the same on foot as well as otherwise, and whereas said defendant well knowing the premises, was bound to keep said highway in such condition as to render it safe and convenient for passage and transient as aforesaid on, over and across the same; yet, nevertheless the plaintiff alleges that heretofore, to wit: On the 10th day of March, A. D. 1879, the said highway was out of repair and in a dangerous and unsafe condition by reason of the gross negligence and default of the defendant of all of which the said defendant had notice, yet nevertheless, to wit: On the day and year last aforesaid at the city of Washington, in the District of Columbia, aforesaid, the said defendant not performing and regarding its duty as aforesaid, wrongfully and negligently permitted and allowed the public highway or street as aforesaid to be and remain out of repair and in a dangerous and unsafe condition, unguarded, and without fixing or placing, or causing to be fixed or placed any light or lights, signal or signals, barricades or other warning or protection at or near a certain deep and dangerous hole in the side-
43 walk in the said street near to and in front of said house No. 121 on said street in said city and District to denote or show that the same was so there as aforesaid, and made no effort to secure the same against accident, or to warn persons passing along said public or common highway or street of the existence of said hole, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid the plaintiff then and there, to wit: On the day and year aforesaid, at about 5 o'clock in the afternoon of said day, while walking moderately and carefully along said street or highway, in front of said 121 C street N. E. aforesaid, stepped her right foot into said hole aforesaid, which was then and there and for a long time had been in the street aforesaid, at the place aforesaid, left open unguarded, and unprotected in any manner whatsoever as aforesaid through the gross negligence and default of the defendant whereby the plaintiff was thrown down to and upon the ground, and whereby the bone or bones of the plaintiff's right leg near the ankle became and were broken or fractured, sprained and bruised

and otherwise injured and whereby the plaintiff's ankle joint and leg became swollen and was rendered weak and unsound and the plaintiff's right hip became and was diseased and rendered weak and unsound and whereby she suffered great pain therefrom and was unable to use her ankle joint, leg and hip without pain and weakness therein, and so by means of said injury the plaintiff became and was sick, lame and disordered for a long space of time, during which she suffered and still suffers great pain, and was and is hindered and prevented from attending to her necessary and lawful business, and was and is deprived of her divers gains and profits, and was obliged to expend large sums of money, to wit: $1,000 in and about endeavoring to be healed and cured of said fractures, sprains, bruises and injuries, as aforesaid, and is permanently incapacitated and rendered unable to transact and
44 attend to her lawful business, and is also seriously and permanently injured in her bodily health and strength, and permanently deprived of the use of her said right leg to the great damage of the plaintiff in the sum of twenty thousand dollars and therefore she brings her suit.

CARPENTER & COLEMAN,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof, otherwise judgment.

CARPENTER & COLEMAN,
Attorneys for Plaintiff.

In the Supreme Court of the District of Columbia.

M. M. PARKER
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 20974.

The defendant says that it is not guilty in manner and form as the plaintiff in *his* said declaration has alleged.

A. G. RIDDLE,
Attorney for the Def't.

45 (Filed Sept. 1, 1879. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

MARIETTA M. PARKER, P'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } No. 20974.

The plaintiff joins issue upon the defendant's plea.

CARPENTER & COLEMAN,
Att'ys for P'ff.

(Filed Oct. 7, 1879. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

MARIETTA M. PARKER
vs.
THE DISTRICT OF COLUMBIA. } No. 20974.

Note of Issue.

Last pleading filed Oct. 8th, 1879.

CARPENTER & COLEMAN,
Att'ys for P'ff.

A. G. Riddle, Esq., att'y for def't.

46 (Filed Oct. 10, 1879. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

MARIETTA M. PARKER, P'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } No. 20974.

SIR: You will please take notice that the issue joined in this cause will be tried at the next term of this court.

Yours, &c., CARPENTER & COLEMAN,
Att'y- for P'ff.

To A. G. Riddle, Esqr., att'y for def't.

(Filed Oct. 10, 1879. R. J. Meigs, clerk.

Judgment against the District of Columbia.

In the Supreme Court of the District of Columbia.

MARIETTA M. PARKER
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 20974.

And now again come here the parties aforesaid, by their respective attorneys, and the jury, respited yesterday, and, after receiving the instructions of the court, upon their oath say they find
47 the issue in favor of the plaintiff, and that the money payable to her by the defendant by reason of the premises is the sum of five thousand dollars ($5,000), besides cost. Therefore it is considered that the plaintiff recover against the said defendant the said sum of five thousand dollars ($5,000), in manner and form aforesaid found, and the costs of the suit, to be taxed by the clerk, and have execution therefor.

The plaintiff also gave evidence tending to show that the said judgment was, on the 16th day of March, 1881, paid by the District of Columbia to the said Marietta M. Parker, in the sum of $5,149.33, including interest and costs on her said judgment to the date of payment, and that the said judgment was thereupon marked " sat-

isfied" upon the record: that, on or about the 17th day of April, 1879, the defendant in this cause, The Washington Gas-light Company, was notified of the claim of the said Parker against the District of Columbia, and that the District of Columbia would look to the said Washington Gas-light Company to make good any amount the said District of Columbia might be called upon to pay on account of the said claim.

The plaintiff further gave evidence tending to show that the gas box in question mentioned in the declaration herein was in front of the premises known as No. 119 or 121 C street northeast, in the city of Washington, and that there was a gas box or stop-cock box placed in the sidewalk at said place in August, 1873, by the Washington Gas-light Company for the purpose of supplying the said houses with gas; that such gas box is a cast-iron cylinder, four inches wide and two and a half feet deep, with a cast-iron cover; that it is set in the earth over the stop-cock for the purpose of reaching down to the cock and turning the gas on or off by the defendant herein from premises adjacent thereto and into which gas had been introduced by said defendant; that it rises perpendicular from the pipe to the sidewalk and is so set as to be accessible from the
48 sidewalk; that the said pipe is intended to be on a level with the sidewalk; that it is made of cast iron, cylindrical in form, and has a metallic top, which sets into the cylinder or into a bell in the end of the cylinder; that on the bottom of the said top or cover are two little lugs, and at opposite sides of the cylinder are two small slots for these lugs to pass into; that the key is put into the top of the box, and that these lugs fasten into these little pieces on the sides and hold it fast to turn the cover with the key; that the said gas box in front of premises No. 119 or 121 C street northeast, at the time of the trial, still remained in the sidewalk.

Upon the cross-examination of plaintiff's witnesses evidence was adduced tending to show that the said stop-cock boxes and other apparatus used in supplying gas to the premises mentioned were put in by the defendant, The Washington Gas-light Company, but that they were put in for and at the request of one George W. Linville, who constructed and built the premises No. 119 C street northeast, and for and upon the request of the firm of Hammond & Gettinger, who constructed and built the premises No. 121 C street northeast; that the said persons paid the said Washington Gas-light Company for the labor and materials used in making the connections between the said premises and the gas main in the public street; that the said connections were made with the premises No. 119 C street northeast, on the 1st day of August, 1873, and with the premises No. 121 C street northeast, on the 11th day of August, 1873.

Further to maintain the issues on its part the plaintiff, against the objection of the defendant, gave in evidence to the jury the deposition of the said Marietta M. Parker, since intermarried, her married name now being Mrs. Marietta Bones, who testified, amongst other things, as follows:

In answer to the third interrogatory, which is as follows:

State whether or not you met with an accident in the city of
49 Washington, District of Columbia, in using the sidewalks of said city. If yea, state if you can the day on which you so met with such accident.

The witness testified as follows:

I met with a severe accident to my foot in a gas box or hole on the 10th day of March, 1879.

To the fourth interrogatory which is as follows:

"If your last answer to the last interrogatory shall be in the affirmative, and that you met with such accident on the 10th day of March, 1879, state where the accident happened, and what the injuries were you received thereby, and the immediate cause of such accident with special reference to the existence or non-existence of an open box, known as a gas box, in the sidewalk in question?"

The witness testified as follows:

"The accident occurred in front of 121 C street N. E., at about 5 o'clock in the afternoon of March 10th, A. D. 1879. The immediate cause of the accident was an open gas box in about the center of the sidewalk; it was a perfect trap, as it was upon a level of the sidewalk, except at the side I stepped into, and there was a part of a brick sunk at least an inch and a half below the level of the walk so that any one in walking along could not see, but the pavement was level until, like myself, when too late. Had not the half of the brick been sunken the open hole would not have been so dangerous; for, upon stepping into the hole, I tried to step back, when I found my box-toe shoe fast in the hole, and the sunken brick let my heel down with my entire weight one and one-half inches more than would have occurred had the pavement been perfect around the gas box."

In answer to the seventh interrogatory, which is as follows:

"State whether or not after the accident referred to in the
50 above interrogatories took place, you did either verbally or in writing communicate the fact to the Washington Gas-light Company or the agents thereof, and if yea, what was the result of such communication?"

The witness testified as follows:

"I communicated with said company both verbally and in writing, and was referred to their attorney. I believe his name was Webb. The result was unsatisfactory. One of their men informed me that the gas company was going to prove that that gas box was not open at the time I received the accident."

In answer to the eighth interrogatory, which is as follows:

"Please state any other facts within your personal knowledge that may enlighten the court and jury in the trial of the above-entitled cause with reference to the accident in these interrogatories referred to—the object of this suit being to recover from the gas-

light company the amount the plaintiff herein paid you on account of the judgment that you recovered against it."

The witness testified as follows:

"It is my impression the gas company did not repair the pavement at all beside the gas box where I received the injury. They did not even cover it for several weeks after, although they had been previously to the accident notified of its danger by a Mr. Smith, a clerk in the Patent Office. It was for the safety of his little child in playing about there that made him notify the gas company, and also knowing a man had hurt his foot in the same box after my injury. I noticed many of the gas boxes in dangerous condition, and invariably notified the company; and of the many reported I never knew them to repair but one, that was on the west side of Masonic temple. Twice I reported a bad one on 12th St., N. W.,
51 I think between H and I, but it had not been repaired when I left there, nearly two years later. This box stuck about two inches above the level of the pavement, and my attention was called to it a second time by a little girl stumbling over it with a large pitcher in her hand, which, upon falling, cut her lip in two. There is no doubt in my mind but the gas company is wholly responsible for the accident I received, as well as for hundreds of others never heard of. It seemed to me when I went upon crutches that not a person spoke to me about the injury but could tell me of their own personal experience of being hurt in some way with the gas boxes, bristling on the sidewalks of Washington."

The plaintiff further gave evidence tending to show that William B. Webb was a practicing lawyer and the counsel for the defendant, The Washington Gas-light Company, at the time of the trial of the said case of Parker against the District of Columbia; and that he was from time to time in the court-room during the progress of the said trial; but upon cross-examination Mr. Webb testified that he took no part in the trial of the said cause, but purposely abstained therefrom.

The plaintiff further gave evidence to the jury tending to show that the gas company employed a superintendent, who was in charge of what is called the distribution department, and whose duty it was to take charge of the distribution of gas, the laying of mains, etc.; that he had a gang of laborers at his disposal under the employment of the gas company and under his charge, and that these workmen were distributed throughout the city in different gangs; that there was no inspector or other person employed by the gas company whose duty it was to inspect stop-cocks and the like, to see if they were in order, and that after the stop-cocks and the gas boxes were put in, the gas company took no further care or charge of them; that the gas company had no means of knowing when a gas box or stop-cock box got out of order, except
52 upon being notified by the occupant of the premises connected therewith, or by the police officers.

The plaintiff, further to maintain the issue on its part, read in

evidence to the jury, against the objection of the defendant, the testimony given by the said Marietta M. Parker on the trial of said cause at law No. 20974, being the cause of Marietta M. Parker *vs.* The District of Columbia, which testimony is in words and figures following, to wit:

In the Supreme Court of the District of Columbia.

M. M. PARKER
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. —.

MONDAY, *December 6th*, 1880.

Deposition of the Plaintiff.

By Mr. COLEMAN:

Q. Where do you reside?
A. 922 H street, northwest.
Q. Where were you living in the month of March, 1879?
A. 1103 East Capitol street.
Q. Where were you on the 10th of March, 1879?
(Question withdrawn.)
Q. Did an accident happen to you in the month of March, 1879?
A. Yes, sir.
Q. Whereabouts?
A. In a gas-hole box in front of 121 C street, northeast.
Q. What time in the day?
A. At about five o'clock in the afternoon.
Q. You may describe to the jury how the accident happened?
A. I was walking along, not looking at the pavement, and my foot caught into this hole and it was detained, the box toe to
53 my boot was held fast in the hole and my whole weight was thrown upon my ankle, but I did not fall clear down; the other limb was not in a position to be of any good to me.

Q. Did that iron gas box project above the sidewalk or was it on a level with the sidewalk?

A. It was on a level, except at the side that I got fastened to, and there was a part of a brick sunk at least an inch and a half, so that in walking along I could not see but that was on a level with the entire pavement.

Q. Tell what happened immediately after the accident.

A. I hobbled along until I got to 125 C street, where I had a friend and was helped to her room and a physician sent for. I remained there until the afternoon of the next day, when I was carried home.

Q. Who was the physician that was sent for?
A. Dr. Dexter.
Q. Did he come?
A. Yes, sir.
Q. What time did he come?

A. It must have been, I think, six o'clock; it was about an hour after.

Q. How did this injury affect you then—at that time?

A. When the doctor came there was more pain in the calf of my leg and ankle than there was at my foot; of course there was some at the foot.

Q. What time did you leave 125 C street?

A. It was about 12 o'clock.

Q. The next day?

A. Yes.

Q. State what had been your condition up to the time of your leaving C street, so far as suffering from the injury was concerned.

A. It is impossible to describe it; I had the most excruciating pain.

Q. Where did you go from C street?

A. To 1103 East Capitol street.

Q. Was that your home?

A. Yes, sir.

Q. State as to the effect of this injury afterwards—after that time.

A. In about four or five weeks the injury had gone to my hip—it would do no harm—and I was taken down with a pain in my hip. The physician told me not to go and undertake to run
54 the sewing machine, and I have not been able to run the sewing machine since that time.

Q. After you went home what was your condition then?

A. I was confined to my bed most of the time for six weeks, and the only rest that I could get was to put my feet upon a level with my body.

Q. How long were you in that condition?

A. For, I should think, four months. About the only rest I could get was to put my feet on a level with my body.

Q. Were you able to go about any at this time?

A. I did go about, but I was not able to. The doctor told me that it was necessary to go out in the air every day if I could.

Q. How did you walk?

A. At first I used a cane, that was not sufficient, and afterward a crutch for about six months, about nine months, I think.

Q. How long did Dr. Dexter attend you?

A. About six weeks.

Q. Did you have any medical attendance after that?

A. I had.

Q. Who attended you after that?

A. Dr. Bliss and Dr. Walker.

Q. How long did Dr. Bliss attend you?

A. I cannot say; I think about six weeks.

Q. Have you continued since the time of the accident to treat your limb for the injury which you received?

A. I have.

Q. Has it recovered; have you recovered from it?

A. No, sir.

Q. How are you affected by it now?

A. I do not suffer all the time; I have a severe pain occasionally, and when the pain strikes me it is like lightning, so severe that I cannot explain it; it does not last but a little while, but it is very severe.

Q. Has that difficulty affected your general health?

A. It has. I have only been out of bed since Thursday.

Q. How has it affected your general health?

A. Well, Dr. Bliss said it was a nervous affection caused
55 . by this injury, and I was given a temporary place in the department, but was unable to keep it.

Q. When were you given that place?

A. About the 4th of August.

Q. Last?

A. Yes, sir.

Q. In what department was that?

A. In the Census Office.

Q. You say it has affected your general health since. What was your weight before this accident?

A. I averaged 155 pounds.

Q. What has it been since?

A. I was reduced to 126.

Q. What was the most you have weighed since then?

A. 138.

Q. What was your means of livelihood previous to the time of this accident?

A. Running a sewing machine.

Q. What kind of work did you do?

A. Plain sewing.

Q. Have you been able to continue that work since, can you?

A. No, sir. Most of the work I have had was making seed bags for the Agricultural Department.

Q. State whether or not you lost any other employment since the accident?

(Objected to; question withdrawn.)

Q. Did you have an opportunity for employment after that?

A. I did.

Q. How long after it?

A. On the 15th day of March.

Q. Who from?

A. Secretary McCreary.

Q. When was this?

A. 15th March, 1879.

Q. The first month you were injured?

A. Yes, sir.

Q. What was your condition of health at the time?

A. I was in bed.

Q. Unable to work?

A. Yes, sir.

Q. Did you, after this injury had been inflicted upon you, make

application to the Commissioners of the District for compensation for your injuries?

56 (Objected to; objection overruled.)

The WITNESS: I did.

Q. When was it that you went there?

A. About the middle of April, I think; the first time that I got out of the house.

Q. Who did you find?

A. The Commissioners.

Q. Have any conversation with them in regard to this injury, or either of them?

A. Yes, sir.

Q. Whom; all of them?

A. Mr. Dent and Mr. Phelps were present the first time I went there, and my conversation was entirely with them.

Q. Did you go there at different times?

A. Yes, sir.

Mr. COLEMAN (to the court): It seems that this witness was finally referred by the Commissioners of the District, for the damages that she had sustained, to the officers of the Washington Gas-light Company, the party who constructed these gas-box holes in the sidewalk, and that she went there.

Q. How came you to go to the Washington Gas-light Company's office?

A. Mr. Dent advised me to go and state my case to the president of the gas company, as I did.

Q. At the time of this accident, when you stepped your foot into the hole, tell the jury how it happened that you stepped your foot into the hole—how you came to do it.

A. I was walking along, and contemplating the beautiful sunset, and not looking at the pavement, I stepped my foot into the gas box, and it got fast to it, and as I went to step back I knew that there was something wrong, and in stepping back the toe of my boot was stuck fast into the hole.

Cross-examination.

By Mr. RIDDLE:

Q. What time in the daytime was this?

A. About 5.

Q. You think it was on the 10th of March, 1879?

A. Yes, sir.

57 Q. Which side of C street were you walking on?

A. On the right-hand side.

Q. As you were going east?

A. Yes, sir.

Q. As you were going up?

A. Yes, sir.

Q. How could you be looking at the sunset looking east? You

were going east, and you stopped to admire the sunset, and turned around for that purpose?

A. I simply looked back at the beautiful red sky, and the sun was nearly down.

Q. Did you turn back to look at the sunset?

A. No, sir.

Q. What attracted your attention to the sunset while you were going east?

A. It was beautiful and red.

Q. That was behind you?

A. Yes, sir.

Q. Where were you going that evening, Mrs. Parker?

A. 125 C street.

Q. Who lived there?

A. Mrs. D. H. Smith.

Q. Was she a friend of yours?

A. Yes, sir.

Q. That was where you did go?

A. Yes, sir.

Q. Did you have some special call there, did you go to make a call?

A. I went there for the purpose——

Q. To keep some engagement that you had made before?

A. Yes, sir.

Q. You were there in compliance to the previous engagement?

A. Yes, sir. On my way back from uptown I stopped there, but there was no engagement with her.

Q. You had an engagement with some person at her house?

A. I went to see her.

Q. What time before that day did you make the engagement?

A. About an hour.

Q. Where had you met her?

A. She was there.

Q. But you say you made an engagement an hour before with her?

A. I went there to see her.

Q. Where did you come from on that occasion, where were you coming from?

A. I was coming from I street; I cannot tell the number. I was coming from Dr. Dyer's house; that was in the First ward.

58 Q. You came then from Mr. Dyer's on I street to Mrs. Smith's at 125 C street?

A. Yes, sir.

Q. And you were going east?

A. Yes, sir.

Q. And passing along alone about the middle of the sidewalk, the first that you knew of the difficulty with your foot was that it was caught?

A. Yes, sir.

Q. And you sustained your entire weight on your foot at the time?

A. Yes, sir.

Q. And you stepped into this hole?

A. Yes, sir.

Q. And you say you didn't detect the fact that you had stepped into it, until you attempted to step back?

A. Of course I must have detected the fact that something was wrong, or I would not have stepped back.

Q. It may have been to look at the sunset?

A. I think not, not at the time.

Q. You stepped your right foot into and then stepped back with your left?

A. I wanted to step back with the right and it was stuck fast.

Q. Bearing your weight on your left foot you attempted to withdraw your right foot from where it was caught?

A. I went to step back with the right foot, and it was held fast.

Q. Your whole weight was on your left foot?

A. It was not.

Q. But it was on the sidewalk, and your weight was upon it, was it? You were not going ahead?

A. I was trying to get out.

Q. You threw your weight back on your left foot and attempted to withdraw your right foot?

A. The whole weight was on my right foot and my left foot came upon the pavement somewhere.

Q. You attempted to withdraw your right foot and could not do it?

A. I know my whole weight was thrown on my right foot.

Q. If you had stepped into a hole of course it would not give way with you, if there was a hole there big enough to take your foot in, you would have gone down into it?

A. Yes, sir.

59 Q. You undertook to withdraw your right foot and you found it was fast there?

A. Of course I used my left foot. I do not think my left foot did me a particle of good.

Q. Then you say you didn't have your weight upon your left foot when you undertook to withdraw your right foot?

A. No, sir; my entire weight was thrown upon my right foot.

Q. You did change your weight back to the left foot before you undertook to withdraw your right foot?

—. I did as soon as I could.

Q. You did withdraw your right foot?

A. Yes, sir; I got it out.

Q. Then did you fall?

A. No, sir.

Q. Was it injured in withdrawing it from the hole?

A. No, sir.

Q. At what time did you get the injury to your right foot?

A. When my weight was thrown upon it, and I was fastened in there.

Q. Then you withdrew your right foot, went on and made your call?
A. Yes, sir.
Q. And got on as best you could?
A. I got to the place.
Q. This you say is on the south side of C street?
A. Yes, sir.
Q. Did that project at all above the sidewalk?
A. Yes, sir.

Mr. RIDDLE: At the time, was this (referring to iron gas box in court)—though I do not know for what purpose they brought it here. There has been no proof as to whether this corresponds in size; I assume that it was claimed that this was something like or similar to the one that she stepped into.
Mr. COLEMAN: This being a similar one.

Q. You say there was a part of a brick sunken in, right on the side of it?
A. Yes, sir.
Q. A part of a brick right next to it that had sunk below the surface?
A. Yes, sir.
Q. Was the general height of this iron box above the general height of the sidewalk?
A. No, sir.
Q. It was on a level?
A. Yes, sir.
60 Q. On the side next to you there was a brick that was depressed?
A. Yes, sir.
Q. How much below the top of this box was the depression?
A. I know that it was some.
Q. You may state the exact height, if you know it.
A. About an inch and a half.
Q. So there was a single brick depressed an inch and a half below that?
A. A half a brick, not a whole brick.
Q. Were you detained there at the time in attempting to withdraw your foot?
A. No, sir.
Q. And you stepped your foot something like that (referring to sample iron box in court)?
A. Yes, sir.
Q. How long were you detained there?
A. Perhaps about a minute, perhaps a half minute.
Q. The injury was in stepping into it, and not in withdrawing the foot?
A. Yes, sir; the foot being held fast.
Q. And you didn't fall?
A. No, sir; not clear down.
Q. Did your hands get upon the sidewalk?

A. No, sir; perhaps one did.

Q. Then you went along and went into a friend's, Mrs. Smith's, where you had medical attendance?

A. Yes, sir.

Q. And there you received the first medical attention, about an hour later?

A. Yes, sir; perhaps not so long.

Q. And you remained there until about how long?

A. Until next day about 12 o'clock.

Q. Will you again state where you then resided?

A. 1103 East Capitol street.

Q. Were you boarding or keeping house at that time?

A. I was living with my mother.

Q. And that was on the 10th of March?

A. Yes, sir.

Q. And this interview, of which you spoke, in which Mr. Dent took part and Mr. Phelps, was about the 15th of what time?

A. About the 17th of April.

61 Q. You didn't say that it was in March when your attention was first called to it before?

A. I think it was not in March; I don't think I said so.

Q. From there you went to the gas office at some time?

A. I think nearly a year after.

Q. You did not at that time go to the gas office?

A. No, sir.

Q. You did not go until about a year after?

A. Perhaps it might not have been more than six months after; I think it was about a year.

By Mr. COLEMAN:

Q. Have you children?

A. I have.

Q. Are you married?

A. No, sir.

Q. How many children have you?

A. Three.

The plaintiff also produced as a witness the wife of H. Clay Smith, a witness for plaintiff in the said case of Parker *vs.* The District of Columbia, and by her proved the death of the said H. Clay Smith prior to this trial. Thereupon the said plaintiff called as a witness, Edwin Forrest, Esq., the stenographer who took stenographic notes of the testimony adduced at the trial of the said cause of Parker *vs.* The District of Columbia, above described, and offered to prove by the said witness that the said H. Clay Smith testified on the trial of the said cause of Marietta M. Parker *vs.* The District of Columbia, that said H. Clay Smith is now dead, and further offered to prove by the said witness what was testified to by the said Smith on the former trial, the said Forrest having testified that he reported the testimony of the said Smith at said trial, and that he had made search for his report but had been unable to find it.

But the counsel for the defendant thereupon interposed and objected to the introduction of said offered evidence of the testimony of the said H. Clay Smith in the other cause aforesaid; but the objection was overruled by the court, to which ruling the defendant excepted, but the said testimony was admitted, and is in the words and figures following, to wit:

62 "As nearly as I can recollect his testimony, Mr. Smith stated that he lived on C street, northeast, within a few doors of 119, or it may have been at 121; that there was a gas box in front of 119 or 121 out of order; that he had noticed it in passing for two or three weeks prior to the accident to Mrs. Parker, and that he did not know how the top of the box came off, but he had noticed it."

The counsel for the defendant excepted to the said ruling of the court and to the admission of the said testimony of the said Smith, and the said exception was, before the said evidence was given to the jury, noted on the minutes of the court, and the court is requested to sign and seal this, its first bill of exceptions, which is accordingly done, now for then, this 23d day of Jan'y, A. D. 1888.

W. S. COX, *J.* [SEAL.]

After the signing and sealing of the defendant's first bill of exception, which is made part hereof.

The plaintiff further gave testimony tending to show that the defendant had men employed whose duty it was to examine, about the first of each month, the condition of the meters in every house throughout the District into which gas had been introduced by the defendant; that it was the duty of such persons to notice and report whether any gas boxes or stop-cock boxes in the sidewalks were out of order or the covers thereof off; that the superintendent of said gas company had often made repairs to gas or stop-cock boxes, by putting on cover of same, and so on, when his attention had been called to it by said employees.

Plaintiff also gave testimony tending to show that in case the owner of private property, who had paid the defendant the cost of laying the service pipes and connections with the gas mains discontinued the use of gas in his premises he would not be permitted to remove the same; that the adjoining private-property owner

63 is never permitted to have a key to the said gas or stop-cock box; that the said defendant as between it and a tenant exercised exclusive supervision and control over the same; that the officers of the defendant had notice of the injury to the said Marietta M. Parker and the cause thereof before suit was brought against said District; that at the trial of said case of Parker against said District, the superintendent of said gas company and another employee of said company were present and testified, as witnesses for the District of Columbia.

The plaintiff further gave in evidence the charter of the defendant, as follows: (Here set it out.)

And thereupon the plaintiff rested.

Thereupon the said defendant, by its counsel, upon the evidence

mentioned in the first bill of exceptions made part hereof, and also upon the other evidence given by the plaintiff, as aforesaid, and made part hereof, moved the court to direct a verdict for the defendant; but the court overruled the said motion, and refused so to direct a verdict, whereupon the defendant, by its counsel, then and there duly excepted to the said ruling of the court, and the said exception was duly noted at the time upon the minutes of the court, and the defendant prays the court to sign and seal this, its second bill of exceptions, which is accordingly done, now for then, this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon, after the evidence in the foregoing bills of exception made part hereof, the defendant, to maintain the issues on its part, gave evidence to the jury tending to show that the said stop-cock boxes were put into the sidewalk in August, 1873, at the request of George W. Linville and Hammond & Gettinger, who were the owners of the premises connected with them, respectively; that the said gas-light company furnished the materials and performed the labor necessary thereto, at the request of the said parties,
64 in the same manner as any other plumber or gas-fitter or skilled workman would do; that the price for said labor and materials was paid by the said parties, respectively, to the gas company; that the said stop-cock boxes were placed in the sidewalk just inside of the curbstone, and within eight or ten inches of the inner side of the said curbstone, and that they were sunk in the ground so that the top of the said stop-cock box was flush with the surface of the brick foot-walk, and that the work was well and skilfully done; that the said gas company never had any notice that the said gas boxes or either of them were out of order until some time after the alleged accident to the said Marietta M. Parker, and that then they received notice through one Doctor William F. Wallace, who was an inspector employed by the District of Columbia, and who notified them of the alleged injury; that thereupon an officer was sent to the locality, who examined the said stop-cock boxes and found them in perfect order. The deposition of the said Doctor Wm. F. Wallace, given on the trial of the said cause of Parker *vs.* The District of Columbia, was read at the trial, the said William F. Wallace being dead, which deposition tended to show that he gave the notice aforesaid; that he also inspected the said stop-cock boxes and found the same in order, and that this was two or three weeks after the accident to the said Marietta M. Parker. The defendant, notwithstanding the objection of the plaintiff, gave evidence further to show that after the said stop-cock boxes had been so put into the said sidewalk by the said Washington Gas-light Company for the said parties the Board of Public Works of the District of Columbia changed the grade of the said C street at the point in question and narrowed the street by removing the curbstone, on either side, four or five feet nearer to the center of the said street, and that the said Board of Public Works took up the brick footway in which the said stop-cock boxes had been set and removed the

same out to the curbstone, so reset as aforesaid, without
65 moving or causing to be moved the said stop-cock boxes, and thereby leaving the said stop-cock boxes in or near to the center of the footwalk, instead of at the outer edge thereof, as they had been placed by the defendant, The Washington Gas-light Company; that the gas-light company was not called upon to move the said stop-cock boxes, nor was it notified by the said Board of Public Works that the said sidewalk had been so moved; that the said Washington Gas-light Company had never interfered with or in any way dealt with the said stop-cock boxes after the same were originally put there in the year 1873, as aforesaid.

The said defendant, notwithstanding the objection of the plaintiff, further gave in evidence an ordinance passed by the mayor and board of aldermen and the board of common council of the city of Washington, approved on the 17th day of March, A. D. 1868, which is found on page 466 of Webb's Digest, establishing regulations for the putting in of gas pipes, stop-cock boxes, etc., which ordinance is in the words and figures following, to wit:

"Before the execution of any ordinance of this corporation authorizing or directing the paving of any carriage-way or public alley where lateral sewerage or gas-service or water-service pipes may be necessary in front of any lots or parts of lots or subdivisional parts of lots, it shall be the duty of the commissioner of improvements of the ward in which such improvements may have been ordered, to notify the owner or agent or occupant of all lots or parts of lots or subdivisional parts of lots where lateral sewers or gas-service or water-service pipes may be required, that the said sewerage and service pipes must be provided and properly laid within ten days from the date of said notice; and if, at the expiration of said time, any owner shall have failed to provide the sewerage or lay the pipes as aforesaid, it shall be the duty of the commissioner of the ward to cause the same to be done of the following material, viz: The lateral sewer to be laid of the best quality
66 six-inch glazed earthen drainage pipe from the main sewer to one foot inside the curb line; the gas-service pipe to be laid of one-inch wrought-iron pipe, from the main to one foot inside the curb line with a one-inch gas cock and cast-iron box and cover inside the curb line; and the water-service pipe, to be laid of three-quarter-inch strong lead pipe, weighing not less than three pounds and two ounces to the foot, from the main to one foot inside the curb line, with a three-quarter-inch brass cock without projecting stem, and the usual box and cover inside the curb line. And in order to defray such expense as may be incurred under this act by any commissioner of a ward, a special tax shall be, and is hereby, levied in just proportions, and according to the expense incurred in each case, on all the lots or parts of lots which shall have been supplied with sewerage and service pipes as aforesaid."

The defendant further gave evidence tending to show that the stop-cock boxes in question were put in by the said Washington Gas-light Company in August, 1873, as aforesaid, in accordance with the requirements of said ordinance.

The defendant (notwithstanding the objection of the plaintiff) further gave evidence tending to show that at the time the said stop-cock boxes were put in they were required to and did pay to the District of Columbia the sum of one dollar for a permit to open the street at the said point for the purpose of putting in said stop-cock boxes, and that it was, in 1873, and still is required and does take out a permit, and to pay the said price therefor, before digging open or excavating in any street or sidewalk, or removing any bricks in any sidewalk in the said District of Columbia.

And thereupon the defendant closed its testimony.

The above evidence was all the evidence in the cause.

67 Thereupon the evidence on both sides, made part hereof, having been closed and given to a jury, the plaintiff, by its counsel, prayed the court to instruct the jury as follows, to wit:

The jury is instructed that at and prior to the time of the accident mentioned in the declaration, it was in law the duty of the defendant to exercise reasonable supervision of the gas boxes placed by it and lying within the streets of the city of Washington, and if the jury find from the evidence that the defendant employed or procured no person or persons to examine or supervise, from time to time, the gas box mentioned in the declaration; that the said gas box was, and remained prior to the accident mentioned in the declaration, uncovered and unprotected in the street for so long a time to have enabled the said defendant, with the exercise of reasonable diligence, to have known such fact, and to have remedied the same; that the said accident mentioned in the said declaration was respectively alleged and denied at the trial of the cause, numbered 20974 at law, in this court, to have been occasioned by the fact that said gas box was so uncovered and unprotected; that defendant had sufficient notice or knowledge of the institution and trial of said cause to have enabled it to assist in the preparation or trial thereof, or that in fact it did so assist; and that the judgment mentioned in the declaration was recovered against and paid by the plaintiff, as alleged, the plaintiff is entitled to recover in this action.

To the granting of which prayer the counsel for the defendant objected, but said objection was overruled, and the said prayer was allowed by the court and read to the jury, whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time on the minutes of the court, and the counsel for the defendant prays the court to sign and seal this, its third bill of exceptions, which is accordingly done, now for then, this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

68 Thereupon the plaintiff moved the court to instruct the jury on the evidence set forth in the first, second, and third bills of exceptions, which evidence is hereby referred to as a part of this exception, as follows:

"The jury is instructed that the municipal authorities of the District of Columbia had the legal right to widen the sidewalk in

question, and require the said gas box of the defendant to be placed at any point on the sidewalk, and the fact that, by the improvement of said street, the gas box referred to in the testimony was thrown in the center of the sidewalk, and thus placed in a position where it would become more dangerous to pedestrians in case it should become out of repair, does not relieve the defendant from its responsibility to keep the same in proper repair."

To the granting of which prayer the counsel for the defendant objected, but said objection was overruled, and the said prayer was allowed by the court and read to the jury, whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time on the minutes of the court, and the counsel for the defendant prays the court to sign and seal this, its fourth bill of exceptions, which is accordingly done, now for then, this 23rd day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first, second and third bills of exceptions, which is hereby referred to as a part of this exception to instruct the jury, as follows:

By the charter of the defendant its pipes and works were to be laid and constructed subject to such conditions and regulations as the plaintiff or its predecessor the corporation of Washington should prescribe, and while it might have been competent for the
69 plaintiff or its predecessor to impose the duty of supervising or repairing the gas boxes upon the defendant, there is nothing to show the imposition of such duty, and in the absence thereof, the duty of supervising, if not of repairing, devolved on the plaintiff, and the defendant was entitled to notice from the plaintiff that the gas box in question was out of repair, and in the absence of such notice the plaintiff is not entitled to recover.

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court, and the defendant prays the court to sign and seal this, its fifth bill of exceptions, which is accordingly done, now for then, this 23rd day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first, second and third bills of exception, which is hereby referred to as a part of this exception, to instruct the jury as follows:

The duty to supervise the gas boxes belonged primarily to the plaintiff, and it having notice that the gas box in question was out of repair, was bound to give notice to the defendant to repair, and, in the absence of such notice, the plaintiff is not entitled to recover.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the

defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court; and the defendant prays the court to sign and seal this, its sixth bill of exceptions, which is accordingly done now for then this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

70 Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first, second and third bill of exceptions, which is hereby referred to as a part of this exception, to instruct the jury as follows:

The gas box alleged to have been out of repair was lawfully placed on the sidewalk near the curb, and, by the widening of the sidewalk by the plaintiff, was thrown into or near the center of such sidewalk; and, if the jury shall find that the said gas box was more dangerous to pedestrians in the latter position than in the former position, and that the plaintiff, by its action as aforesaid, contributed to the injury for which the verdict and judgment were rendered, then the plaintiff is not entitled to recover in this action.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court, the defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court; and the defendant prays the court to sign and seal this, its seventh bill of exceptions, which is accordingly done now for then this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first, second and third bill of exceptions, which is hereby referred to as a part of this exception to instruct the jury as follows:

The evidence given in the former trial by the plaintiff so far as the same is relevant to the subject of negligence charged against the defendant in this suit may be considered by the jury.

But the court refused to grant said prayer and allow the same to be read to the jury upon the ground that the said prayer is ambiguous, to which opinion and ruling of the court the defend-

71 ant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant prays the court to sign and seal this its eighth bill of exceptions, which is accordingly done now for then this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court upon the testimony set forth in the first, second and third bill of exceptions, which is hereby referred to as a part of this exception to instruct the jury as follows:

5. If the jury shall find from the evidence, that, at the time of the accident to Mrs. Parker, there was a hole in the sidewalk, or a sunken brick there alongside of the said gas box, as testified to by

the said Mrs. Parker in her case, then the defendant in this case is entitled to your verdict, unless the plaintiff by evidence satisfies the jury that on the said trial of its said suit between the plaintiff in this case and said Mrs. Parker, it was proved that the injury to Mrs. Parker was caused exclusively by the said open gas box and so found by the jury.

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant prays the court to sign and seal this its ninth bill of exceptions, which is accordingly done now for then this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

And thereupon the court in lieu of the foregoing instruction marked 5, asked by counsel for defendant gave the following instruction to the jury:

"If the jury find that the matter in controversy in the former suit, as to the cause of the accident to Mrs. Parker, the plaintiff therein, was the defective condition of the sidewalk, in respect as well of an open gas box, as of the condition of the pavement
72 adjoining thereto then, in the absence of evidence to show on what ground the verdict was rendered, the record in the former suit is not conclusive upon the question whether the gas box was the sole cause of the accident," to which ruling of the court the defendant by its counsel duly excepted and prayed the court to sign and seal this its bill of exception which is accordingly done now for then this 23d day of January, 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court upon the testimony set forth in the first, second and third bill- of exceptions, which is hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that the injury, for which Mrs. Marietta M. Parker recovered the judgment in question, was caused by the fault of both parties to this suit the defendant is entitled to a verdict."

But the court refused to grant said prayer upon the ground that the matter thereof was covered by a certain other instruction marked by the justice presiding at the trial, "in place of the 5th asked for def't," to which opinion and ruling of the court *the court* the defendant by its counsel duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant prays the court to sign and seal this its 10th bill of exceptions, which is accordingly done now for then this 23d day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon, the defendant, by its counsel, prayed the court, upon the testimony set forth in the first, second and third bill- of excep-

tions, which is hereby referred to as part of this exception, to instruct the jury as follows:

If the jury shall find from the evidence that the alleged
73 injury to Mrs. Marietta M. Parker was caused, in whole or in part, by a defect in the sidewalk alongside of the gas box in question the verdict must be for the defendant.

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court, and the defendant prays the court to sign and seal this, its eleventh bill of exceptions, which is accordingly done now for then, this 23d day of Jan'y, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court upon the testimony set forth in the first, second and third bill- of exceptions, which is hereby referred to as a part of this exception, to instruct the jury as follows:

If the jury shall find from the evidence that the gas box in question was by the defendant in this cause originally set in the sidewalk at the distance from the curbstone required by the ordinance of the city of Washington, to wit, about one foot, and that subsequently and prior to the said accident to Mrs. Marietta M. Parker said street was narrowed and said curbstone and sidewalk were removed further out into the street by the Board of Public Works, or other authority of the District of Columbia, so as to leave the said box in or near the middle of the sidewalk, then the defendant is entitled to a verdict.

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court and the defendant prays the court to sign and seal this, its twelfth bill of exceptions, which is accordingly done now for then, this 23d day of Jan'y, A. D. 1888.

W. S. COX, *J.* [SEAL.]

74 Thereupon the court voluntarily and on its own motion, and upon the evidence set forth in the first, second and third bill- of exceptions, which is hereby referred to as a part of this exception, gave the following instructions to the jury:

GENTLEMEN OF THE JURY: It is a rule of law as well as of common sense that the owner of property must so use it and care for it that it shall not injure anybody else, and if anybody is injured through his neglect to discharge that duty, the party injured has a right of action against him to recover damages and compensation. [*I have applied that rule to this defendant in relation to these stop-cock boxes about which you have heard so much testimony, and I hold it to be part of their duty to treat them as part of their works and to care for them accordingly. Therefore, if it turns out in the proof that through the neglect of this company to exercise proper supervision*

and care of this particular box, the plaintiff in the original suit, Mrs. Parker, was injured, she would have a right of action against the company.] But this box is also in the public street, and it is the legal duty of the municipal government of the District of Columbia to take care that the public streets are kept in proper condition so that no injury shall result from a defect in their condition to wayfarers; and if the District neglects that duty it is equally liable with proprietor of this box to anybody who is injured.

If we assume, therefore, that the gas company was negligent, and that the District was also negligent in not seeing that the gas company did its duty, and that the box was in proper condition, a party injured could have his action against either this defendant or the District of Columbia; and inasmuch as in such a supposed case, the neglect of the defendant would be the primary cause of the whole trouble; if the District of Columbia is sued and is obliged to pay damages, the District, in turn, would have a right to look to
75 this company to reimburse it, if the company was negligent in this regard.

The District may pursue one of two courses when it is sued in a case like this. In the first place it may simply ignore the gas company entirely, and give it no notice at all of the suit pending against the District, but may proceed to defend as best it can. In that case, if the District is obliged to pay damages, it would have the right to turn around and sue this defendant, if the whole thing resulted from the neglect of the company; but then the District would have to prove the whole case over against the gas company. The record in the other case would be no evidence at all, and the District would have to prove the cause of the accident; that this defendant was the owner of the thing causing the accident, and was responsible, through neglect, for it; and it would have to prove the nature of the accident, and the exact amount of injury that was suffered by the party hurt. There is a way, however, in which all that trouble may be avoided. When the District is sued it has a right to give notice to the party who is liable over to it of the pending suit, and to call upon that party to defend it. It appears in this case that the District did give notice to the gas company of the pendency of this suit sufficient to put upon the gas company the duty, and to give it the right to defend that original suit against the District. The consequence of that notice is to make the gas company a party to that suit. It is a rule of law that when a judgment is rendered in any case, so long as it stands unreversed, it is conclusive against all the parties to that suit in reference to the facts established by that judgment; that is to say, they are not allowed to deny the facts which that verdict and judgment has established, or, in the technical language of lawyers, they are estopped from denying any fact established by that judgment. So when the District of Columbia is sued for the neglect which it alleges to be the neglect of the gas company, by giving it
76 notice of that and requiring it to come in and defend, it is enabled, when judgment is rendered against the District, to offer that judgment in evidence in the suit which the District

brings against the company, and that judgment is conclusive of everything that was established as necessary for its foundation, and that the verdict was established by proof of all that is necessary for the foundation of its action.

The suit against the District in behalf of Mrs. Parker proceeded upon the idea that there was a defect in the sidewalk; that the District neglected to have it repaired, and that Mrs. Parker fell into the excavation, whatever it was, and was thereby injured, and suffered damages to the amount of $5,000. We may take it to be established by the record that the District was negligent in regard to whatever this defect in the sidewalk was, and that Mrs. Parker did receive an injury in consequence of it, and that she suffered just the damages for which she obtained a judgment. But it often happens that the record is vague and is not as specific as it might be; and it so happens in this case. Mrs. Parker's declaration or complaint simply alleges that there was a deep hole in the sidewalk, which the District was bound to keep in order; but she does not describe the nature of it in her declaration. Therefore it was necessary to go outside of the complaint or declaration in that case and to offer parol or oral proof to show what that hole was into which it was alleged that she fell. I have therefore allowed evidence to be offered to show to you what was the defect in the other case, and the evidence in that case identifies this gas box as the hole which she described in her complaint, and the evidence does show that she got her foot into an open gas box or stop-cock box, which I have held is under the control of the defendant, and that, at least in part, if not in whole, that was the cause of the injury to her.

77 If that was all in the case, then the verdict in the other case would conclusively establish that that gas box was the entire cause of the accident, and the defendant here would not be allowed to gainsay that fact; but it is claimed on the part of the defence here, that in that case it was not only a question about the injury to the plaintiff from putting her foot into a gas box, but also a question about her being injured, in part, by a defect in the sidewalk. Therefore they say that we do not know exactly on what ground the verdict was rendered in that case, whether it was because the jury thought that she was injured simply by getting her foot into this gas box, or that she was injured also in part, and perhaps would not have been hurt at all but for the depression on the sidewalk adjacent to this box; [*and if there is evidence that both of these questions were submitted to the jury as matters in controversy, and we cannot tell on which ground the jury decided, that verdict and judgment would not be perfectly conclusive upon the question whether it was in consequence of the gas box being open only or also in consequence of this alleged defect in the sidewalk*]. There is evidence both in that case and this tending to show that there was a half brick an inch and a half or two inches below the level of the rest of the pavement. It does not appear in evidence whether that was a fault in the original construction of the pavement, or whether

it was owing to the subsidence of the brick afterwards. On that subject the evidence is silent.

[*Inasmuch as it is a question of fact as to what was decided in the other case, it is necessary for you to decide what was before the jury in the other case, and you have got to decide that from the report of the testimony in the other case made by the short-hand reporter who has been examined on that subject.*] [I will refresh *your recollection by referring to the deposition of Mrs. Parker, who was examined with reference to her injury. She says here:*

78 "*I was walking along, not looking at the pavement, and my foot caught into this hole and it was detained, the box toe to my boot was held fast in the hole and my whole weight was thrown upon my ankle, but I did not fall clear down; the other limb was not in a position to be of any good to me.*

"*Q. Did that iron gas box project above the sidewalk or was it on a level with the sidewalk?*

"*A. It was on a level except at the side that I got fastened to, and there was a part of a brick sunk at least an inch and a half so that in walking along I could not see but that was on a level with the entire pavement.*"]

Then in an important part to which counsel of the plaintiff calls attention she says:

"Q. Was it injured in withdrawing it from the hole?

"A. No, sir.

"Q. At what time did you get the injury to your right foot?

"—. When my weight was thrown upon it and I was fastened in there."

It is claimed on the part of the defendant that the question was fairly presented to the jury in that case whether the injury was not caused or aggravated by this depression in the sidewalk. On the other hand, it is claimed by the plaintiff that although Mrs. Parker did make an allusion to this depression in the pavement, she did not lay any particular stress upon that as the cause of the injury, and attributed the injury entirely to getting her foot fastened in the hole and being thrown back upon that foot with the whole weight of her body, etc. You have got to determine, in the best way you can, from the evidence you have heard, what question was there submitted to the jury. [*If it is matter of doubt on what ground the jury found, if both questions were before it, whether the gas box or the pavement was the cause of the injury, this verdict would not, of course, be perfectly conclusive on the question of which way the jury may have found; and then it is an open question upon which you are entitled to*

79 *hear any other evidence which might be produced on the other side. If on that evidence you should be satisfied that the injury would not have happened but for this depression in the sidewalk or that it was aggravated by that fact, so that you could not apportion the injury between the gas box and the sidewalk and the District, quite a grave question presents itself.*]

The sidewalk is a matter over which the gas company have no

control at all. It is directed by the authorities of the District. We have nothing in the case here to show when that defect in the sidewalk occurred, whether it was part of the original construction or a subsequent occurrence or whether the District had any notice of it or not; but if you can come to the conclusion that this depression in the sidewalk was one of the joint causes of this injury I feel bound to say that I do not see how the District of Columbia could recover damages from the gas company. [*If, on the other hand, you are satisfied that this defect in the pavement plays no conspicuous part or no part at all in this injury but that it was wholly due to the exposed condition of this gas box, then only one question remains and that is whether the gas company was negligent in regard to the condition of that box and whether its exposed condition was due to the negligence of the company.*]

The verdict in the other case did establish that the District of Columbia was negligent in the discharge of its duty with reference to the streets, by not keeping them in proper condition, [*but it did not conclusively fix upon this defendant the charge of negligence, as I have stated to counsel in the course of the discussion here.*] It may be that the District was negligent for not looking after the streets and not seeing that this box was covered, and it may be that the gas company was not. It might have happened in this way, that some of the officers of the District may have seen this condition of the box the morning that it occurred, and may not have reported it, and they may have had time to remedy it before this accident, and still the gas company might be totally ignorant of it; so that it is an open and independent question for you to decide, whether the condition of the box was due to negligence on the part of this defendant. [*Now, this question contains several elements. If the company has actual notice that its works are exposed and dangerous, and neglects to repair it, it is a plain case of negligence. If it had no actual notice—but it ought to have had notice in the exercise of that care and supervision which every proprietor, whether private or corporate, ought to exercise over its own works—then it should be dealt with and treated as if it had notice and had neglected, in consequence of that notice, to discharge its duty of care and supervision. The testimony on that subject, which you heard read, is that of a deceased witness, who was examined at the former trial. He is not present here, but his testimony is admissible only on the ground that this defendant was virtually a party to the other suit, and therefore had an opportunity to go in there and defend it, and cross-examine the witness. Under these circumstances the testimony of the deceased witness in another case between the same parties, or not between the same parties, but parties to that suit, is admissible in evidence.*] The testimony of one of the witnesses, Mr. Smith, was heard by you, and that was the box had remained in an uncovered condition for more than three weeks. [*That is the principal testimony submitted to you on the question of negligence, and it is for you to decide, under all the circumstances, whether that is sufficient proof of negligence on the part of this defendant.*]

And thereupon and before the jury retired from the box, the counsel of the defendant excepted to the said charge, and was about

to designate to the court the specific matters excepted to when the court interposed and stated that any portions of the charge excepted to could be marked after the jury had retired, and the charge had been reduced to writing and in conformity with the said direction of the court, after the jury had retired, and the charge reduced to writing, the portions of the charge inclosed in brackets
81 and italicised by being underscored with pen and ink were so inclosed and italicised as the parts excepted to, and thereupon the defendant prayed the court to give to the defendant each of the said exceptions separately in this bill of exceptions, to have the same force and effect as if each of the said exceptions was set forth in a separate bill of exceptions which is granted, and to sign and seal this its 13th bill of exceptions, which is accordingly done, now for then, this 23rd day of January, 1888.

W. S. COX, *J.* [SEAL.]

82 *Proceedings in General Term.*

MONDAY, *January 5th*, 1891.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, January 5th, 1891.

Present, presiding: Justices Hagner, James, Montgomery, and Bradley.

THURSDAY, *January* 22, 1891.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justices James & Montgomery.

* * * * * * *

DISTRICT OF COLUMBIA
vs.
WASHINGTON GAS-LIGHT CO. } At Law. No. 22757.

Argued on behalf of appellant by E. Totten and on behalf of appellee by S. T. Thomas and George C. Hazleton, and in reply by W. D. Davidge, for defendant appellee, and cause submitted.

83 MONDAY, *April 6th*, 1891.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, April 6, 1891.

Present, presiding: Chief Justice Bingham and Justices James and Montgomery.

WEDNESDAY, *May* 27, 1891.

Session resumed pursuant to adjournment.

Present: Chief Justice Bingham and Justice James.

* * * * * * *

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } At Law. No. 22757.

Because it appears to the court here that there is no error in the record and proceedings or in the judgment of the special term, it is considered by the court that the said judgment be, and the
84 same hereby is, affirmed, and that the appellee recover against the defendant, appellant, judgment as in special term stated, together with *his* costs herein expended, and have execution therefor.

E. F. BINGHAM, *C. J.*

Bond for Writ of Error.

Filed June 3, 1891.

In the Supreme Court of the District of Columbia, the 29th Day of May, 1891.

THE DISTRICT OF COLUMBIA
vs.
THE WASHINGTON GAS-LIGHT COMPANY. } No. 22757. In Error.

Know all men by these presents that we, The Washington Gas-light Company and George A. McIlhenny, are bound unto the above-named District of Columbia in the sum of twelve thousand dollars, to be paid to the said District of Columbia, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each
85 of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 29th day of May, 1891.

Whereas the above-named The Washington Gas-light Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named The Washington Gas-light Company shall prosecute its said writ of error to effect and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] WASHINGTON GAS-L'T CO.,
By GEO. A. McILHENNY, *Pres't.*
[SEAL.] GEO. A. McILHENNY.

Sealed and delivered in presence of—
CHAS. B. BAILEY, *Secretary.*
A. B. KELLY.

Approved June 3, 1891.

E. F. BINGHAM,
Chief Justice.

86 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The District of Columbia, plaintiff, and The Washington Gas-light Company, defendant, being No. 22757, at law, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from June 3, 1891, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of June, in the year of our Lord 1891, and of the Independence of the United States the one hundred and fifteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

87 *Citation to the Supreme Court of the United States.*

The United States of America to the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington Gas-light Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-one.

June 3, 1891.

E. F. BINGHAM,
Chief Justice.

Service acknowledged on this 10 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

S. T. THOMAS,
Ass't Att'y D. C.

88 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 10th day of June, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By H. W. HODGES,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 10th day of June, 1891.

E. F. BINGHAM,
Chief Justice. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 10th day of June, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By H. W. HODGES,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 14,807. District of Columbia supreme court. No. 269. The Washington Gas-light Company, plaintiff in error, *vs.* The District of Columbia. Filed August 14, 1891.

Office Supreme Court, U. S.
FILED
OCT 10 1895
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 269. 40

THE WASHINGTON GAS-LIGHT COMPANY,

PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

STIPULATION.

ORIGINAL CHARTER.

ACT REGULATING GAS-WORKS.

Law Reporter Print

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 269.

THE WASHINGTON GAS-LIGHT COMPANY,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

Stipulation.

It is hereby stipulated and agreed by and between the counsel for the plaintiff in error and the defendant in error, in the above entitled cause, that the Act of Congress approved July 8th, 1848, being the act of incorporation or charter of the Washington Gas-Light Company, and which was offered in evidence at the trial of the above entitled cause in the Supreme Court of the District of Columbia, as appears from the record at page thirty-two and also the Act of Congress, approved June 23d, 1874, entitled "An Act regulating Gas-Works," may be read at the hearing of this cause in the Supreme Court of the United States from the volumes of the United States Statutes at Large containing such acts and in every way as if the said acts had been proved and incorporated into the record filed in this cause.

(Signed) S. T. THOMAS,
Atty. for Defendant in Error.

W. D. DAVIDGE,
WM. B. WEBB,
Attys. for Plaintiff in Error.

ORIGINAL CHARTER.

AN ACT to incorporate the Washington Gas-Light Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John F. Callan, Jacob Bigelow, B. B. French, W. H. Harrover, M. P. Callan, W. A. Bradley, and W. H. English, and their present and future associates, are hereby declared to be a body politic and corporate, by the name and style of the "Washington Gas-Light Company," and by the same name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, in all courts of law and equity in the District of Columbia and elsewhere; and to make and have a common seal, and the same to break, alter, and renew at pleasure, to ordain and establish such by-laws, ordinances, and regulations, and generally to do every act and thing necessary to carry into effect this act, or to promote the objects and designs of this corporation.

SEC. 2. *And be it further enacted*, That the capital stock of this corporation shall not exceed fifty thousand dollars; that a share in the same shall be twenty dollars; and books of subscription to the said capital stock, or to such portions thereof as from time to time may, by the directors for the time being, be deemed proper and necessary, shall be opened by the appointment or under the direction of the directors hereinafter named, subject to such rules, limitations, and conditions as by them shall be prescribed; and the stock of the said corporations shall be deemed personal property.

SEC. 3. *And be it further enacted*, That the stock, property, and affairs of the said corporation shall be managed and conducted by or under the direction of five directors, being stockholders; that the said directors shall hold their offices for one year from the second Monday, and shall be elected on the first Monday in January in each year, at such time and place in the city of Washington as a majority of the directors for the time being shall appoint, and that notice of such election shall be published in at least two of the public newspapers printed in the city of Washington, at least fourteen days previous to the time of holding such election, and every such election shall be by ballot, and by such of the stockholders who shall attend for that purpose, either in person or by proxy; and each stockholder shall be entitled to one vote for

each share of the stock which he or she may have held in his or her own name for at least fourteen days before the time of voting, and the persons having the greatest number of votes shall be the directors; and if it shall happen that two or more persons have an equal number of votes, the directors in office at the time of such election shall, by a plurality of votes, given by ballot, determine which of the persons so having an equal number of votes shall be director or directors, so as to complete the whole number to be chosen, and the directors so chosen shall, as soon as may be thereafter, proceed by ballot to elect one of their number for their president; and whenever any vacancy shall happen, the same shall be filled up by the remaining directors by plurality of votes, until the next annual election.

SEC. 4. *And be it further enacted*, That John F. Callan, Jacob Bigelow, B. B. French, W. H. Harrover, M. P. Callan, and W. A. Bradley shall be the first directors of the said company, who shall hold their offices until the second Monday in January, in the year of our Lord one thousand eight hundred and forty-nine, and until others are chosen in their places; and they shall proceed to choose their president at such time and place as they, or a majority of them shall determine.

SEC. 5. *And be it further enacted*, That in case it shall at any time happen that an election for directors shall not take place on the day appointed by this act for that purpose, the said corporation shall not, for that cause, or for any non-user, be deemed to be dissolved, but it shall and may be lawful to hold an election for directors on any other day, in such manner as shall be provided for by the by-laws of the said corporation.

SEC. 6. *And be it further enacted*, That it shall and may be lawful for the directors, or a majority of them, to require payment of the subscription to the capital stock of the said corporation, at such times and in such proportions as they, or a majority of them, shall deem fit, under the penalty of forfeiting all previous payment or payments thereon; and that previous notice of the instalments required to be paid shall be published at least fourteen days in two of the public newspapers printed in the city of Washington.

SEC. 7. *And be it further enacted*, That the president and directors shall have full power and authority to manufacture, make, and sell gas, to be made of coal, oil, tar, peat, pitch, or turpentine, or other material, and to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories, or houses therein contained and situate, and to lay pipes for the purpose of conducting gas in any of the streets, avenues, and

alleys of the said city; and, also, that the said company will so conduct the manufactories of gas as not to injure private property or create a nuisance: *Provided, however,* That the said pipes shall be laid subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe: *And provided further,* That the right to erect or put up any buildings, works, or apparatus for the manufacture of gas shall be subject to such terms, conditions, restrictions, and regulations as the said corporation of Washington may or shall, from time to time, prescribe or direct.

SEC. 8. *And be it further enacted,* That if any person or persons shall willfully do, or cause to be done, any act or acts whatever, whereby the works of said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of the damage sustained by means of such offense or injury, to be recovered in the name of the said corporation, with costs of suit, in any action of debt, to be brought in any court having cognizance thereof.

SEC. 9. *And be it further enacted,* That nothing in this act shall be construed to prevent any person or persons, nor any incorporated company hereafter to be created by Congress for that purpose, from engaging in and pursuing the business specified in the seventh section of this act; and that it shall be lawful for Congress, at any time hereafter, to alter, amend, or repeal this act.

SEC. 10. *And be it further enacted,* That nothing in this act contained shall be construed to authorize the said Washington Gas-Light Company to make, issue, or put in circulation any bill, draft, check, order, promissory note, change ticket, or anything else promising or agreeing to pay money, intended to circulate as money, or the tendency of which shall be to circulate as money or currency; and the violation of any one of the provisions of this section shall be a forfeiture of the charter herein granted, and a fine of fifty dollars against each of the directors voting for the same.

SEC. 11. *And be it further enacted,* That each of the stockholders in the Washington Gas-Light Company shall be held liable in his or her individual capacity for all the debts and liabilities of the said company, however contracted or incurred, to be recovered by suit, as other debts or liabilities, before the court or tribunal having jurisdiction of the case.

APPROVED *July* 8, 1848.

AN ACT

REGULATING GAS-WORKS.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the thirtieth day of June, eighteen hundred and seventy-four, the illuminating power of the gas furnished by any gas-light company, person, or persons in the District of Columbia, shall be equal to sixteen candles by the Bunsen photometer, using the English parliamentary standard Argand-burner, having fifteen holes and a seven-inch chimney, consuming five cubic feet of gas per hour, and such gas shall not contain more than twenty grains of sulphur in any form in one hundred cubic feet, nor more than five grains of ammonia in any form in one hundred cubic feet. When the illuminating gas supplied by any company, person, or persons in the District of Columbia, shall at any one time be of less illuminating power or of less purity than according to the standard just heretofore given, it shall be so reported by the inspector of gas and meters to the company, person, or persons supplying the same, who shall be subject to a penalty of one hundred dollars, to be recovered before the proper tribunal and paid into the treasury of the District of Columbia aforesaid, for each and every day during which such violation shall continue: *Provided, however*, That if it shall appear that such division from the above-named standards could not have been prevented by ordinary care and prudence, but was occasioned by some unavoidable cause, then the said penalty shall not be enforced.

SEC. 2. That a suitable and impartial person, competent as a chemist, who is not a stockholder or employee in any gas-works, shall be appointed by the President of the United States, by and with the advice and consent of the Senate, to be designated and known as inspector of gas and meters, whose compensation shall be a salary of two thousand dollars per annum, and whose duties shall be to test and determine the illuminating power and purity of the gas furnished by any company, person, or persons in the District of Columbia; and to test, prove, and seal all meters that may be hereafter used by them; and that a suitable person, who shall be a gas-fitter by trade, shall be appointed by the President, as aforesaid, on the recommendation of the inspector of gas and meters, as an assistant

inspector, at a salary of one thousand dollars per annum, who shall assist in the duties specified under the direction of the inspector of gas and meters.

SEC. 3. That a laboratory shall be provided and fitted up by the Washington Gas-Light Company, subject to the approval of the inspector, in the central part of the city of Washington, at a distance, as near as may be, of two thousand feet from any gas works, and furnished with suitable apparatus for the transaction of the business of the inspector and assistants inspector, for which it is intended, and the laboratory shall be kept open on all business days between the hours of eight o'clock in the forenoon and five o'clock in the afternoon: *Provided*, That the cost of fitting up said laboratory shall be paid for by each Gas Company in the District of Columbia in proportion to their sale of gas for the year eighteen hundred and seven,y-three.

SEC. 4. That the company, person, or persons furnishing the gas may, if they see fit, on each occasion of the testing of the gas by the inspector or assistant inspector, be represented by some officer, but such officer shall not interfere in the testing.

SEC. 5. That daily inspections, Sundays excepted, shall be made in conformity to the intent of this act between the hours of five and eleven o'clock in the afternoon, and a record shall be kept of each inspection, giving the illuminating power and purity, which shall be open to the public, and a copy of the daily inspection shall be furnished the following day to the company, person, or persons furnishing the gas, Saturday's inspection to be furnished on Monday, and a full report for the month to be furnished upon request, to any daily paper printed in the city of Washington on the day of their publication, next after the twenty-fourth day of each month, to include each day's test from the date of previous publication, and giving the average illuminating power for the month.

SEC. 6. That all bills for gas furnished by any company, person, or persons shall state the average illuminating power for the month; and if the same shall fall below sixteen candles, as in this act prescribed, then the amount of the bill shall be reduced pro rata.

SEC. 7. That in testing meters, the inspector or assistant inspector shall ascertain whether the meter is of proper construction, and requires only the pressure of a column of water indicated by the water-guage, commonly used for such tests, of one-fourth of an inch high to work it, and whether it works regularly and correctly, and registers exactly the amount of gas passing through it, first, at the rate the meter is marked to supply; secondly, at one-third its rate; thirdly, at twice its rate. The standard foot shall be one cubic

foot, containing sixty-two and three hundred and twenty-one one-thousandths pounds, avoirdupois weight, of distilled water at the temperature of sixty-two degrees Fahrenheit, and with a barometrical pressure of thirty inches; and meters registering within two per centum either way of the exact number of such feet passing through them at the first-named rate, and within three per centum at the second and third rates, and no others, shall be deemed accurate and be stamped by the inspector. The inspector shall keep at the laboratory a correct record of all meters inspected by him, with their proof at the time of inspection, which record shall be open at all times to the public for any reasonable examination by any company, person, or persons having any interest therein.

SEC. 8. That any gas-meters now in use shall be proved and tested on the written request of the consumer of gas on whose premises it may be, and in his presence, if he requires, upon the payment in advance to the inspector or assistant inspector of fifty cents for each and every meter inspected, proved, and sealed, and if any such meter, on being tested, shall be found to register inaccurately to the injury of the consumer to an extent exceeding two per centum, the fee of fifty cents shall be returned to the person applying for said inspection and be paid to the inspector by the company, person, or persons supplying the gas; and every such meter shall be considered correct, and sealed accordingly, which shall register quantities varying from the true standard measure of gas of not more than two per centum, and a record shall be kept of the same and of all fees so collected. And all meters hereafter used by any gas company, person, or persons shall be first inspected, proved, and sealed at the laboratory provided for by this act; and for such inspection, proving, and sealing, the company, in the first instance, and thereafter the company, person, or persons applying to have the meter inspected, shall pay fifty cents for each meter, a record of which shall be kept and of the fees so collected; and all fees shall be applied to the payment of the expenses for maintaining and keeping in good order and repair the laboratory and apparatus.

SEC. 9. That each company, person, or persons manufacturing illuminating gas in the District of Columbia, shall, when required in writing, by the inspector of gas and meters, bring to the laboratory any meter that may have been required to be inspected, proved, and sealed, and to return the same to its proper place after such inspection; and it shall not be lawful for any other party or person to remove and return meters.

SEC. 10. That the inspector and assistant inspector of gas and meters shall each give bonds to the extent of double his annual

salary, and shall each take an oath or affirmation, before some officer legally qualified to administer the same, that he will faithfully, diligently, and impartially discharge the duties of his office.

SEC. 11. That the Washington Gas-Light Company shall be authorized, on and after the passage of this act, to charge and receive for illuminating gas furnished to and paid for by the Government of the United States at the rate of two dollars and fifty cents per one thousand cubic feet; and when furnished and paid for by other parties, or by the inhabitants of the city of Washington, at the rate of two dollars and seventy-five cents per one thousand cubic feet: *Provided*, That if the party or inhabitants so furnished shall pay monthly any bill within seven days after the same shall have been presented, said party shall be entitled to a discount upon the amount of such bill at the rate of twenty-five cents per one thousand cubic feet. And all laws authorizing any higher rates are hereby repealed: *Provided*, That when the price of gas coals delivered at the works of the Washington Gas-Light Company shall advance to eight dollars and fifty cents per ton, the price of gas to consumers may be advanced ten cents per thousand cubic feet, and an additional ten cents per thousand feet for each additional dollar per ton that gas coals may advance in price, and in like manner a reduction of ten cents per thousand feet shall be made for each and every dollar per ton that gas coals may fall in price below seven dollars per ton. And for that purpose the Washington Gas-Light Company shall, in the month of May in each year, furnish the Secretary of the Interior with a statement of all their coal contracts or purchases for the ensuing year, excepting the Ritchie mineral and the Richmond coal, the cost of which shall not enter into any calculation in making an average, which statement shall be sworn to before a justice of the peace by their Engineer and Secretary, and the advance or reduction of price shall take place on the first of July ensuing.

SEC. 12. That the Washington Gas-Light Company shall be authorized and required to furnish illuminating gas to the government of the District of Columbia within the distance of fifty yards from any of their mains, on the same terms as to the Government of the United States, and in case of the non-payment of any monthly bills by the said District beyond the period of ten days from the time of presentation, the company shall be entitled to demand and receive interest thereon from date until paid. And the said company shall light, extinguish, keep clean, and repair the Washington City street-lamps at the uniform price of forty dollars for each lamp per annum, to burn two thousand two hundred hours per annum, with

a six-foot burner on each lamp, subject to any regulation that may be prescribed by the city authorities as to the time of lighting and extinguishing the same, and any extra number of hours to be charged and paid for at the same rate: *Provided*, That the city of Washington shall furnish, when necessary, new lanterns to replace old ones, and shall furnish and pay for the reasonable expense of erecting new lamp-posts to replace such as are old, damaged, and unfit for use.

SEC. 13. That if any person or persons, supplied with gas, neglect or refuse to pay the amount due for the same, such company may stop the gas from entering the premises of such person or persons. In no case shall the officers, servants, or workmen of the company remove a meter from premises supplied by the company, unless by consent of the consumer, without first giving forty-eight hours notice in writing by leaving the same at the premises of the consumer; and said removal shall take place only between the hours of eight o'clock in the forenoon and two o'clock in the afternoon.

SEC. 14. That it shall be lawful for Congress at any time hereafter to alter, amend, or repeal this act, and all acts and parts of acts inconsistent herewith are hereby repealed.

SEC. 15. That any person who, with intent to injure or defraud any gas company in the District of Columbia, shall make or cause to be made any pipe, tube, or other instrument or contrivance, or connect the same, or cause it to be connected with any main, service-pipe or other pipe for conducting or supplying illuminating gas, in such manner as to connect with and be calculated to supply illuminating gas to any burner or orifice by which illuminating gas is consumed, around or without passing through the meter provided for the measuring and registering of the quantity of gas there consumed, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment not exceeding six months or by fine not exceeding two hundred and fifty dollars.

SEC. 16. That the price which may be charged for gas by any gas-light company in the District of Columbia shall be uniform and the same to all consumers, and any reduction made in the price or cost to any person or persons, except to officers of the company, shall furnish a legal right on the part of any other person or persons to demand gas at the same cost or price.

APPROVED, *June* 23, 1874.

Office Supreme Court, U. S.
FILED.
OCT 16 1895
JAMES H. McKENNEY,
CLERK.

Ordinances of the City of Washington, in the District of Columbia.

AN ACT in reference to the erection of gas houses and the laying of gas pipes.

SECTION 2. *And be it enacted, etc.*, That before laying down any pipes for the conducting of gas in any of the streets, avenues, or alleys of this city, the company, association, or individual so desiring, shall first obtain from the Mayor a permit in writing so to do, stating the precise point from and to which such pipes are to be laid before opening any street, avenue, alley, or foot pavement for that purpose; and no opening shall be made in any street, avenue, alley, or foot pavement at any one time of a greater length than four hundred feet, and no opening shall remain for a longer period than forty-eight hours, unless for special reasons, which shall be satisfactory to the Mayor; and no foot pavement whatever shall be opened for the purpose of laying pipes therein without the consent of the owner of the property fronting on such foot pavement first being obtained in writing, and exhibited to the Mayor previous to obtaining his consent to such opening, under a penalty of not less than ten nor more than twenty dollars: *Provided, however*, that the above-mentioned restrictions and provisions shall not apply to the opening of foot pavements for the conducting of gas from the main pipes into the house fronting on such pavements, where the consent of the owner has been first obtained: *Provided*, The opening shall be closed before sundown of the day on which such pavement is opened: *And provided, further*, That every and any excavation so made that may remain open after sunset at the crossing or intersection of any street, avenue or alley, shall be safely and securely covered

over, or properly guarded, so as to prevent accident, under a penalty of not less than ten nor more than twenty dollars for every night or part of a night the same may be left exposed; and that the earth so displaced in the streets, avenues, alleys, or foot pavements for laying such gas pipes be properly rammed, and the pavements adjusted to the satisfaction of the Commissioners of the respective wards wherein such pipes are laid, and the streets, avenues, alleys, and pavements restored to the same state as previous to said opening.

SEC. 3. *And be it enacted*, That when any opening made in any street, avenue, alley, or the foot pavements thereof shall be closed, it shall be done subject to the supervision, inspection, and approval of the Commissioners of the ward in which such opening has been made; and every failure or refusal to execute such filling and repairing to the satisfaction of such Commissioner shall subject the company, association, or individual causing such opening to be made to a fine of not less than ten nor more than twenty dollars for every such offence, in addition to such expense as may be incurred to make satisfactory such filling.

Approved, August 15, 1851.

JOINT RESOLUTION relative to the excavations, etc., made by the Gas Company and others.

Resolved by the Board of Aldermen and Board of Common Council of the city of Washington, That the Mayor be and he is hereby instructed to direct the Commissioners of the Wards to examine into the excavations and taking up and relaying pavements and streets by the Gas Company and others, and in all cases where the streets and pavements have not been properly relaid, &c., according to the requirements of law, to prosecute the company and others to the extent of the law.

Approved, June 5, 1852.

An Act concerning Paved Footways.

SEC. 9. Whenever any foot pavement shall become worn out or defective in any respect, from any cause whatever, or whenever any foot pavement or curbstone shall be either below or above the proper grade thereof, so as to render the walking thereon inconvenient, difficult, or unsafe, or whenever a side gutter shall be taken up and relaid, it shall be the duty of the Commissioners of Improvements for the district in which such foot pavement or side gutter may be to notify the owner or owners, or occupier or occupiers of the property fronting thereon, to cause such defective, worn out, or improperly graded foot pavement and curbstone to be either repaired or taken up and relaid or reset, as may be required in the notice; and if such foot pavement be not repaired or taken up and relaid, or such curbstone reset, as the case may be, within five days after said notice, then it shall be the duty of the said Commissioners, under the direction of the Mayor, to have the same repaired or taken up and relaid or reset in the best manner, and to pay the expense thereof out of the funds of the ward in which the foot pavement or curbstone may lie, as soon as the same shall be completed; and he shall immediately furnish the Register with a statement showing the cost of repairing or taking up and relaying such foot pavement, or of resetting such curbstone, as the case may be, in front of each lot or part of lot fronting thereon; and a tax to the amount thereof shall be imposed and assessed upon the said respective lots or parts of lots to reimburse the corporation the amount of said expense; and a copy of said statement shall be immediately furnished by the Register to the Collector of Taxes, who shall proceed to collect and account for the same as other taxes of this corporation are collected and accounted for; and said taxes so imposed and assessed are hereby made due and payable thirty days after said statement of the Commissioner

shall be filed with the Register; and as soon as the Collector shall receive a copy of said statement he shall furnish the owner or owners, or occupier or occupiers of the respective lots or parts of lots on which the tax may be laid, with a statement of the amount of tax on such lots or part of lots, and also a notice of the time when the same is due and payable; and if any portion of said amount shall remain unpaid for more than thirty days after the same shall have become due and payable, then the Collector shall proceed to collect the same, together with interest thereon at the rate of ten per centum per annum, to be computed from the date when the same became due and payable, in the manner prescribed by law for the collection of taxes on real and personal property.

Approved, May 23, 1853.

Office Supreme Court, U. S.
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OCT 18 1895
JAMES H. McKENNEY,
CLERK.

Mr. Justice JAMES delivered the opinion of the Court:

The first question to be considered is, whether, in contemplation of law, the gas box in question was a part of the apparatus of the Gas Company, so as to make that company liable for injuries caused by its defective condition.

It is claimed on the part of the defendant that the authority given to the Gas Company by its charter to lay pipes in the streets and avenues was limited to the laying of mains, and that the distribution of gas from the mains to the consumers was designedly left to be accomplished in such manner as should be prescribed by the Corporation of Washington; the latter being, as it is claimed, already possessed by its charter of ample authority to make the necessary excavations for that purpose, or to grant the privilege of so using the streets as it should see fit; that the corporation exercised that authority in passing the ordinance referred to, and thereby authorized any lot owner to construct the lateral connections leading to his lot, and that in pursuance of that ordinance the gas box complained of was actually put in at the cost of, and was owned by the lot owner, and that consequently the latter, and not the defendant, would be liable for any injury caused by its defective condition. The defendant's contention as to the extent of its own powers was in the following words: "Authority is given, first, to manufacture, and, *for that purpose*, to erect the necessary buildings, works *and apparatus;* and, secondly, to conduct the gas thus manufactured *into the streets*, etc. Here the powers granted to the defendant stopped."

We think that the provisions of the statute are very simple, and that they do not admit of any such construction. For sake of convenience, we repeat a part of its words. They authorize the company to make and sell gas, "to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories or houses therein contained or situated, and to lay pipes for the purpose of conducting gas in any of the streets, avenues and alleys of

the city." Neither punctuation nor the mere order of words is allowed to have a conclusive control in the interpretation of a statute. The substantive grant in this case was of authority to make an extraordinary use of public highways. The effect, therefore, of these provisions may be stated as follows: first, the Gas Company may manufacture gas from any suitable material, and may sell it for use in street lamps and in houses; secondly—and in order to make effectual this authority to sell gas—it may lay conducting pipes in any of the streets. Of course it was intended that such "laying" should be done in the usual manner; that is to say, beneath the surface, so that the company was authorized to excavate the streets for the laying of whatever pipes it was authorized to lay. As to lateral pipes, it was clearly the intent of the statute that the gas which was to be sold for use in the houses should reach them, and therefore that pipes necessary to that end should be laid by some person. The question is, whether this statute provided that they should be laid by the Gas Company. If this power was not granted to the Gas Company by this statute none of these works could be constructed at all, and the intent of the statute would fail unless authority to construct them had already been granted to the Corporation of Washington. To meet this exigency, it is claimed, on the part of the defendant, that powers which included this authority had already been given to the municipal corporation, and that it was, for good reasons, the intention of Congress that the whole matter of the distribution of gas—in other words, the lateral connections—should remain under the sole control of the city corporation. We have, therefore, to consider the powers of the latter.

Section 7 of the Act of May 15, 1820, provided, among other things, that the corporation should have authority "to erect lamps in the streets, . . . to open and keep in repair streets, avenues, lanes, alleys, drains and sewers, agreeably to the plan of the city; to supply the city with water," etc.

Section 8 provided, among other things, as follows: "The said corporation shall have full power and authority to lay taxes on particular wards, parts or sections of the city for their particular local improvements; and, upon application of the owners of more than one-half of the property upon any portion of a street, to cause the curbstones to be set, and the footways to be paved on such portion of a street, and to lay a tax on such property to the amount of the expense thereof; *provided*, that such tax shall not exceed three dollars per front foot; and, upon a like application, to cause the carriage way of any portion of a street to be paved, or lamps to be erected thereon, and light the same; and lay a tax not exceeding the whole expense thereof, in due proportion, on the lots fronting on such portion of a street."

The amending Act of May 17, 1848, provided, among other things, that the corporation should have power "to take up and relay foot pavements and paved carriage ways, and to keep them in repair, and to lay and collect taxes, for paying the expenses thereof, on the property fronting on such footways and carriageways; . . . to cause new alleys to be opened into the squares, and to open, change or close those already laid out, upon the application of the owners of more than half of the property in such squares," subject to certain conditions relating to damages.

These were the only provisions relating to the powers of the municipal corporation, in the matter of streets, that were in force when the Gas Company was chartered; and clearly none of these authorized the corporation to place such structures as lateral pipes and gas boxes in the streets. The powers of municipalities, especially those which involve expenditure of money and the imposition of taxes, are strictly construed. Power to make highways cannot be held to include authority to make sub-structures which have no relation to the use of streets as highways; and power to provide sewers cannot be held to include authority to lay gas pipes, and for that purpose to make excavations. These

lateral conductors, then, and the necessary excavations, were not authorized at all, unless the act incorporating the Gas Company authorized that company to provide and lay them.

On the other hand, that act seems plainly enough, both by implication and by express terms, to grant the necessary authority to the Gas Company. By implication, because power to sell gas, to be used in houses along the streets, imports that the conducting pipes, which the seller is authorized to lay in the streets, are to include pipes which shall conduct it to the purchaser. And by express terms, because the special power to lay "pipes" applies just as descriptively to lateral as to main pipes. Not a word in the statute suggests the distinction of main conducting pipes and "distributing" pipes. In the sense of this statute there is no such thing as a distributing pipe; they are all *conducting* pipes; and they are pipes for conducting gas *in the streets*, when laid anywhere between the building lines. The word "street," when used in respect of a power which is not peculiar to a carriageway—as when the use of streets is granted to a railway—applies to the whole street, including sidewalks and carriageway alike. It has been so held in reference to municipal powers. See *In re* Burmeister, 76 N. Y. 174; *In re* Phillips, 60 N. Y. 16; *In re* Smith, 52 N. Y. 526; Jackson *vs.* Mahan, 100 Ind. 342; Dickson *vs.* Worcester, 138 Mass. 555; Dooley *vs.* Sullivan, 112 Ind. 451; Warner *vs.* Knox, 50 Wis. 429; State *vs.* New Brunswick, 44 N. J. L. R. 46. Such, too, has always been the interpretation of that clause of the organic act which provided that the Board of Public Works should have entire control of, and make all regulations which they should deem necessary for keeping in repair "the streets, avenues," etc., of the city. No one ever doubted that the words "streets and avenues" included the sidewalks. And indeed this application of the word is insisted on by the defendant's own contention that the city corporation already had authority to lay these

lateral connections; for that contention seems to rest upon its alleged control over the streets.

Another proposition touching this question of authority remains to be considered. The provision which authorizes the Gas Company to lay pipes is coupled with a proviso, to the effect that "the said pipes"—that is to say, the pipes laid by the company—should be laid subject to such *conditions* and in compliance with such regulations as the corporation of Washington should prescribe. It is to be observed that this provision explicitly required that the pipes affected by the "conditions" should actually be laid only by the company. In other words, the so-called "conditions" could not be such as to determine whether the Gas Company should be allowed to lay certain pipes, or who should exercise the power; but could only be such as related to the manner in which the pipes to be laid by the Gas Company should be laid. Of course the municipal authorities could not, under the pretext of *conditions*, take away any part of a privilege granted by Congress. Yet, the ordinance of 1868 did undertake to declare that what Congress had authorized the Gas Company alone to do should not be done by it, but by somebody else. To that extent the ordinance was a nulity.

We hold, then, that notwithstanding the cost of making this lateral connection, including the gas box in question, was paid by the lot owner, that structure was put there by the defendant in the exercise of its own exclusive authority, and was in contemplation of law a part of its apparatus.

We understood at the argument that the responsibility of the defendant for its condition in that case was not disputed. We cite, therefore, only a single case; and we cite this only because it well states the high degree of this responsibility to the public. In Holly *vs.* Boston Gas Light Company, 8 Gray, 124, the court said: "The defendants, under their charter, were in the employment of a great and peculiar privilege; that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of respon-

sibility in the conduct of their business, and in the preservation of every part of their apparatus from defects by which the public at large might be subjected to great inconvenience, and particular individuals might be exposed to imminent peril and danger in respect of their property and lives. They were, therefore, under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all resonable promptitude and dispatch, whatever exigency might occur requiring their attention."

The jury were properly instructed, then, that "it was in law the duty of the defendant to exercise a reasonable supervision of the gas box placed by it in the streets of Washington."

It is objected, however, that there was no evidence which justified a submission of the question of negligence on the part of the defendant; in other words, that there was no evidence to show that the Gas Company had knowledge, before the accident, that the gas box was out of repair. The particular point of the exception is, that the evidence on that subject was incompetent. It consisted of a repetition, by the stenographer who took down the proceedings at the trial of Parker *vs.* The District, of the testimony given at that trial by a witness who had since deceased; and was to the effect that the gas box in question had remained uncovered and in a dangerous condition for several weeks before the accident to Mrs. Parker.

In the cases cited in support of this exception, such evidence was properly excluded on the ground that the party against whom it was offered was a stranger to the action in which the evidence was originally given. We think that such evidence is admissible in what is called "an action over," on the ground that, having received notice of the trial of the original action, and having had the opportunity to take part in that defense, and to cross-examine the witnesses, he is not a stranger to such former action. When the law

has afforded to such a party the same opportunities and guaranties for securing the truth which it affords to a party to the record, it regards him as having in that respect the status of a party. Mr. Greenleaf, whose explanation of the principle was commended by the Supreme Court in Lovejoy *vs.* Murray, 3 Wall. 18, describes him as "a party in the larger sense." 1 Greenl. Ev., Secs. 523, 525. See also Robbins *vs.* Chicago, 4 Wall. 657 (672). Of course it is not necessary that there should have been an actual cross-examination, if the opportunity was afforded. Carzenove *vs.* Vaughan, 1 M. & Selw. 4; McCombie *vs*, Anton, 1 M. & G. 27. If it was the duty of the defendant to see to it that its gas boxes in the highways should not injure any person by reason of being out of repair, it had all the interest that a technical party could have in the question whether a defect had existed, and had existed long enough to charge it with notice. The subject-matter of the former evidence was common to the District and itself, and their opportunities for truth and guaranties against mistake or falsehood were the same. We think that every condition was satisfied which should make the evidence of the deceased witness at the former trial competent evidence against the defendant in the "action over."

It is next objected that the recovery against the District was for an injury caused partly by the open gas-box and partly by the depression of an adjoining brick; that the latter was a defect in the sidewalk for which the plaintiff alone was responsible; that consequently the plaintiff was a joint wrongdoer, and therefore could not recover at all in this action over. The principle as to joint wrongdoers is correctly stated; but, if it be conceded that the recovery was for an injury caused by the combined operation of the two defects, we do not perceive that there is any ground for holding that the plaintiff was, in respect to this depressed brick, a wrongdoer at all. As was remarked by the court in its charge, there was no evidence in this case tending to

show that that depression occurred in the original construction of the sidewalks, or when it occurred. In other words, there is no evidence to show that the plaintiff had notice, before the accident, that such a defect existed, so as to be guilty of negligence in failing to repair it. Whatever the defects on which the judgment may have been based, the rule as to joint wrongdoers can have no application in the absence of proof that the plaintiff was a wrongdoer as to one of them; that is to say, in the absence of proof that the plaintiff was liable for the depressed brick.

It is further objected, however, that no recovery ever can be had in this action, even if the plaintiff was not a wrongdoer in respect of the sunken brick; the contention being that the judgment against this plaintiff, nevertheless, included damage done by that defect, and that this defendant, at all events, is not responsible for the latter. The further contention, of course, is that, as the judgment is not apportionable, nothing can be recovered if a part cannot. We think that this objection is not tenable.

The defendant's own hypothesis in making it is that *Mrs. Parker's foot* was caused to sink into the depression adjoining the open gas box. In that case the open gas box was, in contemplation of law, the *causa proxima* of the whole injury. When one person, either maliciously or carelessly, throws another into an excavation—and that is just what this defendant is alleged to have done—it is no excuse that he did not make the excavation, and is not responsible for it.

His own act is, nevertheless, *causa proxima* of the whole damage. If the original action had been directly against the defendant instead of the District, the recovery would properly have included the damage partly done by the depressed brick, if the evidence showed that the open gas box threw her foot into that depression. It is no more a defense in this action over than it would have been in a direct action, that the Gas Company was not responsible for the existence of the cavity into which its negligence threw her.

It will be observed that we differ from the instruction given in the charge on this point; but whatever errors there may have been in the views of the court was in favor of the defendant, and, therefore, is not a ground of exception on its part.

Finally, it was objected that this gas box, having been originally placed, in obedience to the ordinance of 1868, near the curbstone, where it was not likely to cause injury to pedestrians, had been caused by the Board of Public Works to occupy the center of the sidewalk, where it was more dangerous. We do not perceive the importance of this suggestion. The Board of Public Works had the same authority to determine the position of the gas boxes which the corporation of Washington had possessed, and if it did cause this gas box to be more likely to do mischief unless it were well looked after, it did not relieve the defendant of its duty to so look after it. It is the defendant's duty to keep these gas boxes covered, whatever place they may occupy in the highway, and to be all the more careful to do so when they are in a dangerous place. As the Supreme Court of Massachusetts said in the case above quoted, the privilege which it has received charges it with an assiduous duty.

Judgment affirmed.

Office Supreme Court, U. S.
FILED.
OCT 10 1895
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE WASHINGTON GAS-LIGHT COMPANY,
PLAINTIFF IN ERROR,

v.

THE DISTRICT OF COLUMBIA,
DEFENDANT IN ERROR.

No. 40.

BRIEF FOR THE PLAINTIFF IN ERROR.

W. D. DAVIDGE,
W. B. WEBB,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

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THE WASHINGTON GAS-LIGHT COMPANY,
PLAINTIFF IN ERROR,
v.
THE DISTRICT OF COLUMBIA,
DEFENDANT IN ERROR.

No. 40.

STATEMENT.

This was an action brought by the defendant in error to recover over against the plaintiff in error the amount of a judgment, with interest and costs, recovered against the former for an injury sustained by reason of a defect in a sidewalk in the city of Washington.

The original action was brought by a certain Marietta M. Parker, who alleged that the District of Columbia negligently allowed "a certain deep and dangerous hole" in the sidewalk to remain in an unsafe condition and unguarded, and that the plaintiff, whilst walking carefully, stepped into said hole and was injured (R. 19).

The declaration in the present action (R. 12), after set-

ting out the former suit, verdict, judgment, and payment thereof, alleges that the "certain deep and dangerous hole" was a certain open gas box, which "was placed in the sidewalk and street aforesaid by the said defendant, The Washington Gas-light Company, for its own use, benefit, and behoof; that it was the duty of the said defendant so to maintain the said gas box that accident or injury might not or should not happen or accrue thereby or therefrom to any one," but that the defendant failed in said duty and allowed the said gas box to remain out of repair and in an unsafe condition, by reason whereof the plaintiff stepped into the same and was injured.

The declaration further alleged notice to the defendant to appear and defend the former suit (R. 13).

Plea, the general issue with a stipulation that under that plea the defendant might avail itself of any proper defence (R. 14).

The main question in the case was whether it was the duty of the defendant to supervise and keep in repair the gas boxes of the city, which exceed, it may be said, twenty thousand in number.

The contention of the defendant was that the gas box in question, and so as to all others, was placed in the sidewalk of the city, by the direction of the plaintiff, in discharge of a public duty and for public considerations and purposes, involving the health, safety, and convenience of the inhabitants; that the cost of all work and material was paid by the plaintiff by the exercise of its taxing power; that when so placed the gas box became part of the sidewalk, and that if the plaintiff could have thrown the duty of supervision and repair upon the defendant it had never done so, and that hence the plaintiff was not under an obligation to supervise and repair.

At the trial the plaintiff gave in evidence the charter of

the defendant, dated the 8th of July, 1848, by the 7th section of which it is enacted as follows:

SEC. 7. *And be it further enacted*, That the president and directors shall have full power and authority to manufacture, make, and sell gas, to be made of coal, oil, tar, peat, pitch, or turpentine, or other material, and to be used for the purpose of lighting the city of Washington, or the streets thereof, and any buildings, manufactories or houses therein contained and situate, and to lay pipes for the purpose of conducting gas in any of the streets, avenues, and alleys of the said city; and, also, that the said company will so conduct the manufactories of gas as not to injure private property or create a nuisance: *Provided, however*, That the said pipes shall be laid subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe: *And provided further*, That the right to erect or put up any buildings, works, or apparatus for the manufacture of gas shall be subject to such terms, conditions, restrictions, and regulations as the said corporation of Washington may or shall from time to time prescribe or direct.

The plaintiff further gave evidence to show that the gas box was placed in the sidewalk by the defendant in August, 1873, but on cross-examination of the witnesses who so testified (R. 21), and also by the evidence of the defendant (R. 33), it appeared that the defendant in so doing, and also in laying at the same time the lateral service pipes connecting with the gas main of the defendant in the street, acted at the instance and request of the abutting owners, and as any plumber or gas-fitter employed by them might have acted, and was paid for the work and material by the said owners. And it further appeared in evidence that the plaintiff, on the 17th of March, 1868, passed the following ordinance, and that

the gas box in question was placed in the sidewalk by the owners, and at their expense, in accordance with the requirements of said ordinance (R. 34):

"Before the execution of any ordinance of this corporation authorizing or directing the paving of any carriageway or public alley where lateral sewerage or gas-service or water-service pipes may be necessary in front of any lots or parts of lots or subdivisional parts of lots, it shall be the duty of the commissioner of improvements of the ward in which such improvements may have been ordered, to notify the owner or agent or occupant of all lots or parts of lots or subdivisional parts of lots where lateral sewers or gas-service or water-service pipes may be required, that the said sewerage and service pipes must be provided and properly laid within ten days from the date of said notice; and if, at the expiration of the said time, any owner shall have failed to provide the sewerage or lay the pipes as aforesaid, it shall be the duty of the commissioner of the ward to cause the same to be done of the following material, viz: The lateral sewer to be laid of the best quality six-inch glazed earthen drainage pipe from the main sewer to one foot inside the curb line; the gas-service pipe to be laid of one-inch wrought-iron pipe, from the main to one foot inside the curb line, with a one-inch gas cock and cast-iron box and cover inside the curb line; and the water-service pipe, to be laid of three-quarter-inch strong lead pipe, weighing not less than three pounds and two ounces to the foot, from the main to one foot inside the curb line, with a three-quarter-inch brass cock without projecting stem, and the usual box and cover inside the curb line. And in order to defray such expense as may be incurred under this act by any commissioner of a ward, a special tax shall be, and is hereby, levied in just proportions, and according to the expense incurred in each case, on all the lots or parts of lots which shall have been supplied with sewerage and service pipes as aforesaid."

It further appeared by the evidence of the plaintiff that

the defendant had no inspector or other person whose duty it was to inspect gas boxes; and that after they were put in, the defendant took no further care or charge of them, and had no means of knowing when a gas box was out of order except by notice from the occupant of the premises or police officers (R. 23); that the defendant employed men whose duty it was to examine about the first of every month the condition of the meters in every house throughout the District into which gas had been introduced, and that it was the duty of such employees to notice and report whether any gas boxes in the sidewalk were out of order, or the covers off, and that the superintendent of the defendant had often made repairs to gas boxes by putting on covers and the like when his attention had been called to it by such employees (R. 32).

The plaintiff further gave evidence tending to show that the owner of private property who had paid the defendant the cost of laying the service pipes and connections with the gas mains would not be permitted to remove the same if he discontinued the use of gas in his premises; that the "adjoining" property-holder is never permitted to have a key to the gas box; that the defendant, *as between it and a tenant*, exercised exclusive supervision and control over the same; that the officers of the defendant had notice of the injury to Marietta M. Parker and the cause thereof before suit was brought against the plaintiff, and that two employees of the defendant attended said trial and testified (R. 32).

A description of the gas box will be found in the evidence of the plaintiff (R. 21).

The court ruled that *in law* it was the duty of the defendant to supervise and repair.

1st and 2d prayers of plaintiff granted, and exception (R. 35; charge, R. 39, 40).

Assuming that the defendant was bound to supervise and repair, the only evidence that it had notice that the gas box was out of repair was the testimony of a deceased witness at the former trial to the effect that the cover of the box had been off two or three weeks before the accident to Marietta M. Parker.

The death of the witness being proved, his testimony was offered against the defendant to show negligence on its part.

This testimony was objected to, but admitted and an exception taken (R. 32, 33).

The record contains all the evidence in the cause (R. 35), and the above testimony is the only evidence of negligence on the part of the defendant.

By the first prayer of the plaintiff, granted by the court, the jury were told that the fact "that the said gas box was, and remained, prior to the accident mentioned in the declaration, uncovered and unprotected in the street for so long a time as to have enabled the said defendant, with the exercise of reasonable diligence, to have known such fact and to have remedied the same," constituted negligence (R. 35).

It further appeared at the trial that the "certain deep and dangerous hole" did not consist only of the uncovered gas box, but that next to it was a half brick depressed to the extent of an inch and a half, and that the injury was caused by the box-toe of the right shoe of the plaintiff in the former suit becoming fastened in the gas box, and, in her effort to withdraw it, her whole weight being let down into the depression.

Her deposition taken by the plaintiff in this action was by it given in evidence, as was also her deposition taken in the former action in her behalf (R. 21, 24).

She says in the former (R. 22):

"The immediate cause of the accident was an open gas box in about the centre of the sidewalk; it was a perfect trap, as it was upon a level of the sidewalk, except at the side I stepped into, and there was a part of a brick sunk at least an inch and a half below the level of the walk, so that any one in walking along could not see but the pavement was level until, like myself, when too late. Had not the half of the brick been sunken the open hole would not have been so dangerous; for, upon stepping into the hole, I tried to step back, when I found my box-toe shoe fast in the hole, and the sunken brick let my heel down, with my entire weight, one and a half inches more than would have occurred had the pavement been perfect around the gas box."

Also R. 24, 30.

This deponent was the only witness. Thus, as testified by her, the injury was caused by her foot, fastened in the gas box at the toe, being, by the weight of her body, bent over the side of the gas box into the depression. For the defect in the sidewalk, so far as it consisted of the sunken half brick, the District was exclusively responsible.

The court was asked to instruct the jury that if they should find that the injury to the plaintiff in the former action was caused by the fault of both the parties to this suit, the defendant was entitled to a verdict; which instruction was refused, and an exception taken (R. 35).

The court was further asked to instruct the jury that if they found that the injury was caused in whole or in part by a defect in the sidewalk alongside of the gas box, the verdict must be for defendant. Refused and exception (R. 39).

Another question controverted below was as to the effect as evidence of the verdict and judgment in the former action.

As already stated, "the certain deep and dangerous

hole" consisted of the open gas box and the depression made by the sunken brick, *for both of which the District was responsible* to the plaintiff in the former action, and as to both of which evidence was submitted to the jury presumptively and in fact. The verdict of the jury may have been rendered on the ground of either of the defects in the sidewalk, or both combined. To entitle the plaintiff to the benefit of even the limited estoppel allowed in an action for recovery over, it must have been proved at the former trial that the gas box was the sole cause of the injury; and, the estoppel eliminated, the plaintiff could not recover.

The court was asked so to charge, but refused, and an exception was taken.

5th prayer of defendant, 37.

And in lieu of the prayer the court instructed the jury that if there were two defects, the former record was "not conclusive" (R. 38), and charged as follows (R. 42): "You have got to determine, in the best way you can from the evidence you have heard, what question was there submitted to the jury. *If it is matter of doubt* on what ground the jury found, if both questions were before it, whether the gas box or the pavement was the cause of the injury, this verdict would not, of course, be 'perfectly conclusive' on the question of which way the jury may have found; and then it is an open question, upon which you are entitled to hear any other evidence which might be produced on the other side. If on that evidence you should be satisfied that the injury would not have happened but for this depression in the sidewalk, or that it was aggravated by that fact, so that you could not apportion the injury between the gas box and the sidewalk and the District, quite a grave question presents itself."

Exception (R. 44).

And to the same effect R. 41, italics.

The court was asked to instruct the jury that if they found from the evidence that the injury was caused in whole or in part by the defective sidewalk alongside of the gas box, their verdict should be for the defendant. This prayer was (R. 38, 39) refused. The court treated the question as to the cause of the injury as an open question to be determined by the jury upon the evidence, notwithstanding the former verdict and judgment, and it assumed that one joint wrong-doer could recover against another. Exception.

As to the effect of the former verdict and judgment, the court instructed the jury that if they found that the matter in controversy in the former suit was the defective condition of the sidewalk, in respect as well of an open gas box as of the condition of the pavement adjoining thereto, then, *in the absence of evidence to show on what ground the verdict was rendered*, the record in the former suit was not "conclusive" upon the question whether the open gas box was the sole cause of the accident (R. 38).

And this proposition was repeated in the charge of the court in even stronger terms, the words "perfectly conclusive" being used instead of "conclusive." (See charge, passages in italics, pp. 41, 42, 43.)

Thus the court substantially ruled, as to the effect of the former record, that the gas box was the *sole cause of the injury presumptively*, though not "conclusive", or "perfectly conclusive," although the declaration in the former suit alleged only "a certain deep and dangerous hole," and did not make it the duty of the jury to discriminate between the box and the depression, and although the evidence in that suit rendered it impossible to say whether the cause of the injury was the gas box or the sunken brick or the two combined.

The above rulings of the court and the refusal to grant instructions of the defendant to the contrary were excepted to (R. 37, 38, 44).

It should be mentioned that the two rulings last mentioned were not approved by the court in general term (20 Mackey, foot of page 53), which disposed of the propositions on different but, it is respectfully submitted, equally fallacious grounds.

Not only did the court rule that the former record was presumptive evidence, though not "conclusive" or "perfectly conclusive," that the gas box was the sole cause of the injury, but, further, that it was only in the event of doubt as to what was found in the former suit that the jury could consider other evidence.

This also was excepted to (R. 42, 44).

Assignment of Errors.

The court erred:

First. In ruling that it was in law the duty of the defendant to supervise and keep in repair the stop-cock or gas boxes in the city of Washington.

Second. In admitting as evidence of the negligence of the defendant the evidence of a deceased witness given in the former action.

Third. In refusing to instruct the jury that if the injury was caused in whole or in part by a defect in the sidewalk alongside of the box, the plaintiff was not entitled to recover.

Fourth. In refusing to instruct the jury that it was for the plaintiff to satisfy them that the open gas box was the sole cause of the injury.

Fifth. In ruling that the right of the defendant to defend on the ground of the fault of the plaintiff depended upon what was found by the jury in the former suit.

Sixth. In the rulings of the court as to the effect of the verdict in the former suit.

Seventh. In the obscurity of said rulings and their tendency to mislead the jury.

Eighth. In making the defence of contributory negligence depend upon its degree and whether it could be apportioned.

Ninth. In the ruling by the court in general term that there was no evidence of negligence on the part of the plaintiff in respect of the pavement.

Tenth. In its ruling that, if negligent, the plaintiff may yet recover, because the negligence of the defendant was *causa proxima.*

ARGUMENT AND POINTS.

I.—It was not in Law the Duty of the Defendant to Supervise and Keep in Repair the Gas Box (1st Prayer of Plaintiff, R. 35; Charge, 39, 40).

1. By the 7th section of its charter the defendant was authorized to *manufacture and sell* gas to be used for the purpose of lighting the city of Washington and the buildings therein. As incidental, it was further authorized to erect "any *buildings, works, or apparatus for the manufacture of gas,*" subject to "such terms, conditions, restrictions, and regulations as the said corporation may or shall from time to time prescribe or direct," and, further, "to *lay pipes for the purpose of conducting gas* in any of the streets, avenues, and alleys of the said city," provided, however, "that the said pipes shall be laid *subject to such conditions and in compliance with such regulations as the corporation* of Washington may from time to time prescribe."

The above section is the only provision of the charter bearing upon the alleged duty to supervise and repair, and it must be plain that the duty, if it exist at all, must be sought elsewhere than in the charter.

The power given is to lay pipes for the purpose of conducting gas, &c. The gas box or stop-cock box is in no sense a pipe for the purpose of conducting gas. It is a circular box about six or seven inches in diameter and eighteen inches in height, one end of which is placed over the stop-cock and the other is flush with the pavement. By removing the top, communication is had with the stop-cock by means of a so-called key—that is, an iron rod four or five feet long with a wrench at one end to take hold of the stop-cock, and at the other a cross-handle one foot long with point bevelled so as to fit into a slot in the cover of the box and remove it. It is simply an abuse of terms to style such an instrument a pipe for conducting gas. Neither did the charter authorize, in respect of pipes, the use of the surface of the street or sidewalk for any purpose whatsoever. The authority was to lay pipes as they were and are usually laid—that is, under the surface. The stop-cock or gas box placed in the sidewalk by the defendant would have been *ultra vires* and a palpable violation of law.

It is only necessary to read the charter to be satisfied that the intention of the lawmakers was, after the restricted grant of power to manufacture the gas and lay pipes for connecting it and to sell it, to remit to the municipality plenary authority in respect of reasonable conditions and regulations. Such was the policy of the lawmaker, and a wise policy when it is borne in mind that the subject of legislation was the introduction and distribution of a dangerous fluid that involved the health, comfort, and safety of the public.

2. Was the duty to supervise and keep in repair im-

posed by the plaintiff or its predecessors? Such is not and cannot be contended. It is unnecessary to discuss whether it was competent for the plaintiff to impose the alleged duty upon the defendant. Suffice it to say that at no time was any such attempt made. Neither under the large grant of power derived from the provision, "subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe," or otherwise, was the duty imposed or an attempt made to impose it.

For the first time, the assertion of the duty was made in the present case. The learned judge who tried the case held that the gas box was part of the "works" of the defendant, and the court in general term, part of its "apparatus," but it is submitted that each begged the very question in dispute. The only "works" or "apparatus" mentioned in the charter are "buildings, works, and apparatus for the MANUFACTURE of gas" (see 7th section), and it is not possible to see how the defendant had power to construct "works" or apparatus on the sidewalk without authority conferred by its charter or a municipal ordinance.

3. It was argued below that the duty of the defendant to supervise and repair existed at common law.

It was urged that whenever a party for his private benefit does an act, as in the common case of opening a coal-hole, excavating an area, and the like, which renders the use of the street unsafe, he is liable for special injury.

This is conceded, and it is further conceded that he is liable, irrespective of negligence on his part, for the simple reason that the structure is unlawful.

2 Dill., Mun. Corp., 4th ed., § 1032.
Congreve *v.* Smith, 18 N. Y. 79.
Congreve *v.* Morgan, 18 N. Y. 84.
Trovire *v.* Wood, 51 N. Y. 225.

It was further argued that if such act for private benefit be done even with the permission of the municipal body, the party is responsible for negligence in the proper maintenance of the structure.

Such illustrations throw no light upon the present case. In each the party is held responsible for his own act done for his private benefit, and in each the duty is plain.

Wholly different is the present case. The gas box in question and others of the same kind were placed in the sidewalk and paid for by the predecessor of the plaintiff acting from consideration of public duty and to accomplish public purposes and ends.

The design, material, and locality of the gas box were all prescribed by the predecessor of the plaintiff, and the box when placed in the sidewalk became as essentially public property as the sidewalk itself. It has existed in the sidewalk from the time it was placed there, by the force and command of law, and not by the act of any private party for private advantage.

Its evident purpose was to secure to the public, and for the benefit of the public, a ready means of controlling the flow of a noxious and dangerous fluid, which if uncontrolled menaced health, comfort, and life itself.

This gas box and others were placed in the sidewalk by the direction and in pursuance of the ordinance given in evidence (R. 34). The defendant, it is true, supplied the work and material as any other gas-fitter or skilled workman might have done, but beyond that had no other connection with the matter. The cost, ostensibly paid by the abutting owners, was in substance and law paid by the plaintiff in the exercise of its taxing power. In other words, in the exercise of such power, the plaintiff made the abutting owners pay, and the case is the same as if it had itself paid. That such is the legal effect of payment

by the abutting proprietors in the present case, see City of Keokuk *v.* Independent District of Keokuk, 53 Iowa, 352, where, in an action over, it was sought to hold an abutting lot-owner responsible under an ordinance similar to that in evidence. "The city causes the work to be done, and the lot-owner pays for it instead of being taxed for it. The lot-owner is assessed with the work instead of being assessed with a money tax. All the difference between the cases, when the owner does the work and when the city officers do it, is in the method of accomplishing the improvement and paying for it."

The only answer to this is found in the position taken by the court below, that the ordinance in question was a nullity (20 Mackey, 50). If this be so; if the plaintiff, acting *ultra vires*, placed the gas boxes and paid for them, as assumed, it is not easy to perceive how the duty of supervision and repair could be shifted from it to the defendant. But the ordinance was not a nullity. It would not be difficult to show, by other provisions of the charters of 1820 (3 Stat. 583) and 1848 (9 Stat. 223) than those quoted, provisions common to all municipal charters, that the plaintiff possessed ample power to protect persons and property by means of the gas boxes, and that the flow of a noxious and dangerous fluid can be controlled. But it is not necessary to examine the above charters. It is sufficient that the charter of the defendant, the document before the court below for construction, contained in plain terms the grant of the power in question. That charter declares, in terms, "*that the said pipes shall be laid subject to such conditions and in compliance with such regulations as the corporation of Washington may from time to time prescribe.*"

Thus, even if the plaintiff did not possess the power before, which is not admitted, it was expressly given by the charter of the defendant.

But it is argued that as the charter gave to the defendant the power to lay pipes the plaintiff could not lay them, or authorize others to lay them. But the plain answer to this is that the charter did not give to the defendant the power to lay pipes absolutely, but only subject to the conditions and regulations of the plaintiff. A further answer is that the grant of power to the defendant is "*to lay pipes for the purpose of conducting gas*," and that the gas box is not a pipe for conducting gas, if, indeed, it can be called a pipe at all in any proper sense of that term.

But the conclusive answer to the position taken by the court below is to be found in an amendment of the charter of the plaintiff, approved the 23d of February, 1865 (13 Stat. 434), whereby the most explicit authority is given to enact the ordinance. This amendment is in these words:

"And also to lay, or cause to be laid, simultaneously with the grading or paving of any avenue, street, or alley in which a main water-pipe or main gas-pipe or main sewer may have been laid, water or gas service pipes or lateral house drains from such water or gas main or main sewer to one foot within the curb line in front of every lot or subdivisional part of a lot which may bound on such avenue, street, or alley, and to which a gas or water-service pipe or house drain may not have been already laid, and to pay the cost thereof, shall have full power and authority to lay and collect a special tax on every such lot or subdivisional part of a lot."

Approved February 23, 1865.

This disposes of the position taken by the court, and there is left only the wonder how the amendment came to be overlooked.

It needs no argument to prove that the gas boxes afford-

ing access to the stop-cocks, whereby alone the flow of gas is prevented, ought to be under the control of the municipal body. Certainly it cannot be contended that such control should be vested in the abutting owners or even in the defendant. The interests of these parties are entirely subordinate to those of the public. Hence the provisions in the ordinance as to the gas-boxes and their locality for public purposes.

As the plaintiff is the owner of the gas boxes, so, likewise, it has presumptively always supervised and maintained them in repair. The plaintiff took especial pains to show that the defendant did not inspect or repair, but, after the gas boxes were put in, took no further care or charge of them. And the evidence of the defendant was substantially to the same effect (R. 23, 32). The above evidence and other evidence as to the conduct of the parties, such as that the tenant of the premises was never allowed to have a "key" to the gas box, and that, *as between him and the defendant*, the latter exercised exclusive control over the gas box, was not allowed to be passed upon by the jury, as the court decided that *in law* the defendant was bound to supervise and repair.

There was no particle of evidence that the plaintiff did not supervise and repair, or that, as against the defendant and the abutting tenants and all others, it did not exercise absolute control, or that the so-called "keys" were not in the possession of its officers and agents in the fire department and otherwise.

It was argued below that the duty to supervise and repair rested upon the defendant by reason of the benefit accruing to it in its relations to the consumers of gas. It seldom happens that a structure confessedly public does not involve special advantage to some person or persons. A cistern, a lamp, a reservation, are all of great advan-

tage to some and of little or none to others. But it never was heard of that for that reason those benefited were bound to supervise and repair. The true test is whether the structure is public—constructed by the authority of law for public purposes and ends.

The special advantage alleged in respect of the defendant could not have entered into the ordinance, as the power to turn off the gas for non-payment of dues was not given to the defendant until June 23, 1874 (18 Stat. p. 280, § 13).

The alleged duty involves a heavy and wholly unnecessary charge upon the defendant.

These gas boxes exceed in number twenty thousand. There is always one on the pavement of every tenement supplied with gas. To what end an army of inspectors to discharge the identical duty performed by the police, under whose eyes the gas boxes are hourly?

4. Even if the gas box could be regarded as the property of the defendant, placed by it in the sidewalk instead of being placed there by the command of the plaintiff, it must be obvious that the policy and intent of Congress, as shown by the charter of the defendant, were to remit to the municipality the power to prescribe the duty of the defendant in respect of such an appliance. When the charter was passed it authorized for the first time the introduction of gas into the city. It was eminently proper that the defendant should be subjected to the supervision and control of the municipality, and this was sought to be accomplished by the authority given to the latter to prescribe *conditions* and regulations from time to time. Especially was this the case in respect of the gas boxes, in which the public, the consumer, and the defendant were alike interested.

If in the exercise of the judgment and discretion of the

municipality it was proper to throw the duty of repair upon the defendant, it was for the former so to prescribe. If, in addition to the duty to repair, it was proper to impose upon the defendant the further duty to supervise, notwithstanding the hourly supervision by the police force, the municipality could so declare.

But the municipality prescribed no duty. It never acted save to command that the boxes should be placed in the pavement, and become part and parcel of it.

Had the municipality acted in respect of the subject of duty, whilst it might in its discretion have charged the defendant with the duty to repair, it is inconceivable that such duty would have been imposed save after notice by the municipality.

In the present case the duty to supervise is cast upon the defendant (R. 36, 35). By the ordinance of the plaintiff of May 23, 1863 (Webb's Digest, p. 158, sec. 9); also act of Congress adopting ordinances as laws of the U. S. (16 Stat., p. 428), an abutting lot-owner is made liable to a fine for the non-repair of the sidewalk, but this is only *after notice* from the plaintiff. Such lot-owner is not responsible over for a judgment recovered against the city.

City of Keokuk *v.* Independent District of Keokuk, 53 Iowa, 352.
Jansen *v.* Atchison, 16 Kans. 359.
Kirby *v.* Boylston Market Co., 14 Gray, 249.
Flynn *v.* Canton Co., 40 Md. 312.
Heeney *v.* Sprague, 11 R. I. 456.
Eustace *v.* Johns, 38 Cal. 3.

It is submitted that the plaintiff had plenary authority over the sidewalks, and that Congress, by the charter of the defendant, further invested the plaintiff with power to

prescribe such conditions and regulations as in the exercise of its judgment and discretion might be proper in respect of the gas boxes.

It prescribed nothing, and it now contends that, notwithstanding the duty of the defendant was *ex industria* made dependent upon its action, a duty exists, though it never acted. The only inference to be drawn from non-action is that it did not require of the defendant, as it did not prescribe, any duty as to the gas boxes, but was willing to accept them as part of the pavement.

5. Certainly, in any point of view, the alleged duty of the defendant to supervise and repair the gas box depended upon the facts in evidence, but the jury was not allowed to pass upon the facts. The court ruled that the duty existed as matter of law.

The justice who tried the cause held that the gas box was part of the "works," and the court below that it was part of the "apparatus" of the defendant, but the defendant had no power under its charter to place boxes in the sidewalk, and the plaintiff had such power, and whether the box was placed in the sidewalk by one or the other depended upon the facts of the case.

The only "works" or "apparatus" mentioned in the charter are those connected with the *manufacture* of gas.

II.—The Testimony of Smith, a Witness at the former trial, since deceased, was not Competent to Show Notice to the Defendant that the Gas Box was out of Repair.

The testimony of Smith was, when offered, objected to, but admitted, and an exception taken (R. 31, 32).

It was afterwards commented on in the charge as competent evidence of notice, and that portion of the charge was excepted to (R. 43). It was the only evidence to

prove notice. The record contains all the evidence in the cause (R. 35). The evidence of the defendant was that it had no notice before the accident to Mrs. Parker that the gas box was out of place (R. 33). That of the plaintiff, except Smith's, relates only to notice *before suit.*

As to Smith's testimony, the stenographer of the court, who had lost his notes, testified from memory that, as near as he could recollect, Smith had sworn at the former trial that the gas box was out of order; "that he had noticed it in passing for two or three weeks prior to the accident to Mrs. Parker, and that he did not know how the top of the box came off, but he had noticed it."

The duty of the defendant, if it existed at all, depended on notice (2 Dill. Mun. Corp., 4th ed., § 1026 and notes). It is conceded that the defendant had knowledge of the former trial and purposely abstained from taking any part therein. This it had a perfect right to do, for the simple reason that, whatever the merits of the former action as between the parties thereto, the question of duty on the part of the defendant was not, and could not be, litigated in such action, but necessarily belonged to some ulterior proceeding.

This court has had occasion more than once to define the matters in respect of which, in a proceeding like the present, a party having an opportunity to appear in the former action and failing to do so is affected. Such party is very properly estopped as to the existence of the defect, the liability of the defendant in the former action, and the amount of damages awarded. The rule is thus laid down by Judge Dill, vol. 2, § 1035:

"§ 1035. Action over.—If a *municipal corporation be held liable* for damages sustained in consequence of the unsafe condition of the sidewalks or streets, *it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe,* unless

the corporation was itself a wrong-doer as between itself and the author of the nuisance; and if the latter had *notice of the pendency of the action against the municipality*, and could have defended it, he has been held to be concluded as to the existence of the defect of or nuisance in the street, and as to the liability of the corporation to the plaintiff in consequence thereof, and as to the amount of damage or injury it occasioned. But, although duly notified, he is not, says the Supreme Court of the United States, 'estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault that the accident happened.'"

Chicago *v.* Robbins, 2 Black, 418; S. C., 4 Wall, 657.

It thus appears that, as to certain matters involved in the former action, a party having an interest in such matters is allowed at his option to appear and litigate them, and if an opportunity is afforded to appear and litigate, is bound by the result.

But how is it in respect of matters not involved in the former action, and which cannot be litigated therein? How is it in respect of the duty or obligation of a party claimed by the defendant in the former action to be liable over? Plainly, the question of such duty or obligation is foreign to the former action, and cannot be litigated therein, as this court has decided.

Had this defendant appeared in the former action, it could only have been heard in respect of the issues therein. It could not have been heard in regard to its own duty, for the plain reason that the duty under trial was that of the defendant in the former action, and not of the defendant in this action. Had the latter been present by counsel at the former, it could not, in respect of the subject of its duty, have been heard either by the cross-examination of Smith or otherwise.

The only question of notice in the former action was notice to the defendant therein.

The above considerations seem to dispose of the error under discussion. The authorities cited by the court below, page 52, are relied on as showing the rule and its limitations. The fallacy of the decision, it is submitted, consists in assuming that because the legal effect of the opportunity to appear and be heard in a pending suit is to bind a party in respect of issues in that suit, he is bound also as to other and different issues foreign to that suit.

III.—The Plaintiff, who Joined in the Infliction of the Injury, Could not Recover over Against the Defendant.

The defendant prayed the benefit of this defence, but it was denied.

See prayer 5, R. 37–8.
Also R. 38, 39.
Also charge, R. 42, 43.

The court made the right to the defence to depend upon what had been tried and determined at the former trial.

R. 38, 42, 43.

The evidence of the plaintiff given in this action clearly showed that the injury was the result as well of the uncovered gas box, for which both the plaintiff and defendant were responsible, as of the sunken brick in the sidewalk, for which the plaintiff was exclusively responsible (R. 38). No great damage could have ensued from the gas box alone, but the toe of the shoe being held fast by the gas box, the foot, with the whole weight of the body upon it, was bent over the iron side of the gas box and

the heel let down into the depression caused by the sunken brick.

Thus the plaintiff, solely responsible for the sunken brick, directly co-operated in the infliction of the injury, and, being a wrong-doer, could not maintain this action for indemnity and thereby throw the whole onus upon the defendant.

The court ruled that this defence depended on what was found by the jury in the former suit. It will be assumed that the declaration in the former suit alleged a "deep and dangerous hole," and the plaintiff in that suit could recover whether the cause of the injury was the gas box, the sunken brick, or both. There was nothing in that suit to require the jury to discriminate between these causes and find which of them was the cause of the injury. The court further ruled that the jury would have to determine, "in the best way it could," what question was submitted to the former jury; that if the gas box was submitted and found to be the sole cause, then the verdict in that action was conclusive against the defendant in this action, and if both the gas box and sunken brick were submitted as causes, then, in the absence of evidence to show on what ground the jury found, the verdict in the former suit would not be "conclusive" (see instruction of court in place of instruction 5, R. 38), or "perfectly conclusive" (see charge, R. 42), that the gas box was the sole cause.

Thus the defence that the plaintiff was itself a wrong-doer was made to depend upon the former suit, and it was also made to depend upon the fact whether the jury in this case could "apportion the injury between the gas box and the sidewalk and the District," and the further fact of how far the defect in the pavement plays a "conspicuous" part in this suit. All this, it is submitted, was erroneous.

The case was tried as if the opportunity to appear concluded the defendant in respect of all matters involved in the former suit and, in addition, in respect of all matters between it and the plaintiff outside that suit and which could not be litigated therein.

The defendant could not show in the former suit that the plaintiff was in fault, and, in consequence, could not seek indemnity from the defendant. The question was whether the plaintiff in that suit was entitled to recover, and it mattered not whether the defendant in that suit, the plaintiff in this, had or had not, by its own fault, lost any remedy over.

The rulings of the learned justice were not approved by the court in general term (20 Mac. 53).

The latter court, whilst unable to approve them, goes even farther in denying the benefit of the defence. It holds (20 Mack., pp. 52, 53) that, assuming the sunken brick was part of "the deep and dangerous hole," there was no evidence that the plaintiff was a wrong-doer, as it never had notice of the defect.

The court entirely overlooks the fact that the former record was given in evidence (R. 17) by the plaintiff, and that the declaration (R. 18) charges, in the most explicit terms, that the plaintiff had notice of the defect in the sidewalk, and allowed "the deep and dangerous hole" to continue in an unsafe and dangerous condition. The fact of notice is charged both generally as an ingredient in the "gross negligence" alleged, and, more than that, in express words, and such fact is found by the verdict of the jury. And this is not all. The declaration, verdict, and judgment in the former suit are recited and made part of the declaration in this action, and the liability of the plaintiff here, the defendant in the former action, is conceded, the only subject of contention here being that "the deep and

dangerous hole" was the gas box (R. 12, 13, 14). It is thus clear that the plaintiff was a wrong-doer if the sunken brick was part of the "deep and dangerous hole," and hence was disabled from maintaining an action over.

Being a wrong-doer in respect both of the gas box and the sunken brick, it cannot seek indemnity in this action.

Assuming against the record itself that the plaintiff was not negligent in respect of the sunken brick for the want of notice, the learned court below then proceeds to argue that the open gas box was *causa proxima*.

It is hardly necessary to follow this argument. It is said that "when one person, either maliciously or carelessly, throws another into an excavation,—and that is just what this defendant is alleged to have done,—it is no excuse that he did not make the excavation."

This may be true, but the proposition is in no manner involved in the present case.

The proposition here is essentially different, and may be stated thus:

If negligence for which a party has a remedy over is an initial cause of injury, and, pending operation of that cause, the negligence of such party introduces another cause, and the two causes combined result in the injury, such party cannot recover over.

In such case the injury is the direct result of two co-operative causes, for both of which the plaintiff is liable. There is no question of *causa proxima*. The sunken brick was even more proximate than the open gas box if refinement be permitted, but in substance the two causes combined to produce the injury. There can be no recovery over, any more than where there is one cause, and the party seeking recovery over was an active participant in that cause.

It is submitted that the judgment should be reversed and a new trial ordered.

W. D. DAVIDGE,
W. B. WEBB,
for Plaintiff in Error.

H. R. WEBB,
JOHN S. WEBB,
of Counsel.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 40.

The Washington Gas Light Company,
Plaintiff in Error,

vs.

The District of Columbia,
Defendant in Error.

BRIEF FOR THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
Attys. for District of Columbia.

In the Supreme Court of the United States.

October Term, 1895.

THE WASHINGTON GAS LIGHT COMPANY,
Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA,
Defendant in Error.

No. 40.

BRIEF FOR THE DEFENDANT IN ERROR.

In July, 1879, a certain Marietta M. Parker brought her suit against the District of Columbia to recover for personal injuries by falling into "a certain deep and dangerous hole" in C street, Northeast, in the City of Washington. This "deep and dangerous hole" consisted of an open gas-box in the sidewalk placed there by the plaintiff in error in 1873, for the purpose of supplying premises Nos. 119 and 121 C street with gas, and was seriously injured. Mrs. Parker brought suit against the District to recover for said injuries, and the case was tried to a jury on the plea of "not guilty," resulting in a verdict against the District for $5,000.00, on which judgment was entered. The District, on the 15th of March, 1881, satisfied the judgment by paying to Mrs. Parker the amount thereof, with interest and costs, making in all $5,149.00.

Prior to the bringing of her action, Mrs. Parker made her claim against the District for damages in respect of her injuries, and the Gas Light Company was duly notified of the claim, and that the District would look to it to make good any amount it might be compelled to pay on account thereof. After the trial, and within the time limited by the rules of the court for motions for new trials, the District notified the Gas Light Company of the result of the trial and that it, the District, would not further defend the case, and offered the Gas Light Company the use of its name for further defense of the cause.

Points of Law and Argument.

While a municipal corporation, having the exclusive care and control of streets, is, in a proper case, liable to one who is injured by reason of the defective condition of one of its streets, it yet has a remedy over against a private party who has so used the streets as to produce the injury, unless the corporation concurred in the wrong. Such private party is concluded by the judgment against the corporation for his act or negligence, if he knew that the suit was pending and could have defended it, even though he had no express notice so to defend; but he is not estopped to show that he was under no obligation to keep the street in safe condition, or that the injury did not result from his act or neglect, or that the corporation itself was also in fault.

Chicago *vs.* Robbins, 2 Black., 418;
Robbins *vs.* Chicago, 4 Wall., 657.

The verdict and judgment against the corporation in such case is conclusive upon the party in original default as to the facts: (1) That the highway was defective; (2) That the person was injured there while using due care; and, (3)

Of the amount of damage by the injury, but not (1) of his liability to keep the place in repair, nor (2) of his having neglected (failed) to do so, nor (3) of his neglect or his failure having been the sole cause of the injury.

Boston *vs.* Worthington, 10 Gray, 496.

And it is incompetent for the party in default to prove that in making a dangerous excavation he was guilty of no negligence, or that he properly guarded and covered the same on leaving off work on the night of the injury.

Portland *vs.* Richardson, 54 Me., 46.

The liability of the party in such cases is for the amount of the judgment against the corporation, with costs, interest and counsel fees.

C. and O. Company *vs.* County Commissioners, 57 Md. 201;
Stoughton *vs.* Porter, 13 Allen, 191;
Woburn *vs.* Henshaw, 101 Mass., 193;
Port Jervis *vs.* First Nat. Bank, 31 Hun., 107;
Troy *vs.* T. and S. Co., 49 N. Y., 657;
Rochester *vs.* Montgomery 72 N. Y., 65;
Heiser *vs.* Hatch, 86 N. Y., 614.

There was evidence tending to show (Rec., 21) that the gas box or stop-cock box in question was the property of the Washington Gas Light Company; that it was placed in the sidewalk by the company in 1873, at the request of owners of premises adjoining, the company furnishing the materials and performing the labor necessary thereto. "That the said owners paid the company for the labor and materials used in making the connection between the said premises and the gas main in the public street."

The company's charter (9 Stat., 722), which was given in evidence, authorized it, under certain regulations as to open-

ing the streets, to lay mains and gas service pipes, and put stop-cock boxes, in the sidewalks of the streets of Washington. An ordinance of the late corporation of Washington (Webb's Digest, 466) provides that the Gas Light Company shall lay its service pipes, of one-inch wrought-iron pipe, from the main to one foot inside the curb line with a one-inch gas cock and cast-iron box and cover inside the curb line.

The privileges extended to this company by its charter are peculiarly for its own advantage, the City being only indirectly benefitted. Moreover, the Gas Light Company by its charter impliedly agreed with the City that if it was permitted under certain regulations not material to this controversy, to open the City's streets and avenues, and lay mains and service pipes, and to put stop-cocks and stop-cock boxes in the sidewalk for its own benefit, it would exercise reasonable care and supervision over its said works and take care that they did not become a nuisance. Section 8 of the Charter of the Gas Light Company is as follows:

"Sec. 8. And be it further enacted, That if any person or persons shall willfully do or cause to be done any act or acts whatever, whereby the works of said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount sustained by means of such offense or injury to be recovered in the name of the said corporation with costs of suit, in any action of debt, to be brought in any court having cognizance thereof."

And yet we have the spectacle of this company setting up as a defense to this action that the plaintiff was at fault in not protecting the gas box when in a dangerous condition;

that the company put the gas box in the street under a permit from the plaintiff to open the street for which it paid a fee of one dollar, and that after the gas box had been put in the street, the plaintiff's late Board of Public Works changed the curb lines of the street so as to throw the gas box in the center of the sidewalk, and that defendant was not called upon to remove said gas box when this change was made in the street, and that after the gas box was put in it paid no further attention to it. But this defense, while a little singular, under the facts disclosed by this record, is not new; it has been made before. It was made in a slightly different form, and overruled in Chicago *vs.* Robbins, *supra.* This court, in disposing of Robbins' defense that he was licensed by the City of Chicago to have his area opened, and that the city should look out for it and see that it should not become a nuisance, used this language:

"The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it except incidentally. Robbins impliedly agreed with the city that if he was permitted to dig the area for his own benefit, he would do it in such manner as to save the public from danger and the city from harm; and he cannot now say that true it is you gave me permission to make that area, but you neglected your duty in directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons; because the city is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises, should not pay the city for his wrongful act. The city gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if in the progress of the work, its original

character was lost and it became unlawful, the city is not at fault. We see no justice or propriety in the rule that would hold the city under obligations to supervise the building of such an area as this."

That the Gas Light Company paid the District of Columbia a fee of one dollar for permission to open the street and put in the gas box in question is nothing to the point. The payment of this fee did not expressly or impliedly license the company to abandon supervision over the gas box and allow it to lose its original character and become a nuisance. The ordinance given in evidence merely regulated the manner and time of laying service pipes and putting in stop-cocks and stop-cock boxes; it gave no license to the Gas Light Company to create a nuisance. Nor does the ordinance exempt the company from supervising gas boxes, its own property, or impose that duty on the plaintiff.

That the Washington Gas Light Company is not such a public corporation as is claimed in this case, is shown by Commonwealth *vs.* Lowell Gas Light Company (12 Allen, 77), wherein the court in disposing of a like contention said:

"But we fail to see that the defendants can be properly regarded as a corporation of this character. No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one either for public or private use or consumption. It is entirely at their own option whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election."

In this case the court also considered the question as to what constituted the "machinery and apparatus" of the Gas Light Company, and said on page 78:

"The mains or pipes laid down in the streets and else-

where to distribute the gas among those who are to consume it were clearly a part of the apparatus necessary to be used by the corporation in order to accomplish the object for which it was established. They constituted a part of the machinery by means of which the corporate business was carried on, in the same manner as pipes attached to a pump or fire engine for the distribution of water, or wheels in a mill, which communicate motion to looms and spindles, or the pipes attached to a steam engine to convey and distribute heat and steam for manufacturing purposes, make a portion of the machinery of the mill in which they are used. Indeed, in a broad, comprehensive and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes one great integral machine, consisting of retorts, station-metres, gas-holders' street-mains, service-pipes, and consumers' metres, all connecting and operating together, by means of which the initial, intermediate and final processes are carried on, from its generation in the retort to its delivery for the use of the consumers."

I.

It Was in Law the Duty of the Defendant to Supervise and Keep in Repair the Gas Box in Question.

It is argued in behalf of the plaintiff in error, that the gas box or stop-cock box is not a pipe for the purpose of conducting gas and is no part of the "works or apparatus" of the company. The object of this stop-cock was to enable the Gas Light Company to control the flow of its gas as supplied to its consumers. It was a most essential part of its works and is protected by the 8th section of the company's charter from all manner of interference. The penalty for interference is not payable to the corporation of Washington, but to the Gas Light Company. The contention of counsel for plaintiff in error, that stop-cock boxes of the company are not part of its buildings, "works and apparatus"

for the manufacture of gas, is too narrow. The charter authorizes the plaintiff in error to manufacture, make and sell gas to be used for the purpose of lighting. It is manifest that the company could not sell its gas without some device, as in this case the stop-cock and box, in the street for shutting off the flow whenever for default of payment or for other cause it becomes necessary. These devices necessarily must be in front of each house supplied by gas. It is idle to contend that these stop-cock boxes "when placed in the sidewalk become as essentially public property as the sidewalk itself." It would be just as reasonable to contend that the tracks of a railroad laid in the streets of the city become public property, and that the public authorities are bound to take care of them and see that they do not become a nuisance. The laws of the District of Columbia require its Commissioners to supervise the building of street railroads. Street railroad companies are required to lay their tracks of a certain pattern of rail and according to plans satisfactory to the Commissioners, but it was never contended that this exempts street railroad companies from taking care of their tracks, or that in the event they fail to do so, and an injury results, for which the municipality is liable, the railroad would not be liable over.

It is denied that the purpose of placing gas stop-cock boxes in the street was for the benefit of the *public* and as a ready means for the *public* to control the flow of gas which, if uncontrolled, might menace health, comfort and even life itself. The fact is, stop-cock boxes are placed in the streets by the Gas Light Company as a means of enabling it to control the supply of gas which it proposes to *sell*. The argument of counsel for the plaintiff in error that the cost of the stop-cock boxes, although paid by the abutting owners, was in legal effect the same as if paid by the District, has nothing to do with the case, because the record

shows that the owners neither bought nor paid for the pipe or box, but simply paid for making its connections. Under like circumstances, the payment by the abutting property-owner for a sidewalk by a similar argument, would constitute the sidewalk the private property of the abutting owner.

In Holly *vs.* Boston Gas Light Company (8 Gray, 124), which was the case of an injury to a child by reason of gas escaping from the company's pipes in the street opposite the house in which the child and its father lived, the same defense was made which is insisted upon here, viz., that the municipality was bound to police the gas company's works and apparatus in the streets of the city of Boston; but the court in overruling this contention said: "The defendants, under their charter, were in the enjoyment of a great and peculiar privilege; that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of responsibility in the conduct of their business, and in the preservation of every part of their apparatus from defects by which the public at large might be subjected to great inconvenience, and particular individuals might be exposed to imminent peril and danger in respect to their property and lives. They were, therefore, under the highert degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and dispatch, whatever exigency might occur requiring their attention."

Comment is made in the brief for the plaintiff in error on the effect of the Act of February 23, 1865, amending the charter of the City of Washington. This statute was not considered by the court below for the plain reason that it had no application to the case at bar. The object of the amendment was to provide for the laying of water and gas service pipes simultaneously with the improvement of streets in advance of any necessity or demand for water or gas by

abutting property-owners, so as to avoid the necessity of cutting new pavements from time to time for the purpose of laying water and gas service pipes, to accommodate the demands of abutting property-owners. The record in this case shows that this was a sporadic act. The gas box in question was laid solely for the benefit of the particular property Nos. 119 and 121 C street, N. E., and there is nothing in the record to show that it was placed in the street under the circumstances contemplated by the amendment of February 23, 1865.

In Robbins *vs.* Chicago (4 Wall., 661) there was a city ordinance directing the repair and relaying of all old sidewalks and giving authority to the street commissioner to require the adjoining lot owners to do the work, and in default thereof that the city should do it and charge the expense on the owner's lot.

II.

THE TESTIMONY OF SMITH, A WITNESS AT THE FORMER TRIAL, SINCE DECEASED, WAS ENTIRELY COMPETENT TO SHOW NOTICE TO THE DEFENDANT THAT THE GAS BOX WAS OUT OF REPAIR.

The Gas Light Company was notified of the pendency of the action brought by Mrs. Parker against the District, and of the defective condition of the stop-cock box, and had an opportunity to defend the action, and to cross-examine the plaintiff 's witnesses, and to introduce evidence if it saw fit. It was, therefore, virtually a party to Mrs. Parker's suit. When the law has offered to such a party the same opportunity and guarantee for securing the truth which it offers to a party to the record, it regards him as having in that respect the status of a party.

1 Greenl. Ev., Secs. 523, 525;
Lovejoy *vs.* Murray, 3 Wall., 18;
Robbins *vs.* Chicago, 4 Wall., 657.

It was not necessary that there should have been an actual cross-examination of the witness Smith, as the opportunity to cross-examine was offered to the Gas Light Company.

Casanove *vs.* Vaughn, 1 M. and Selw., 4;
McCombe *vs.* Anton, 1 M. and G., 27.

The testimony of the deceased witness, Smith, was to the effect that the top was off the gas box for two or three weeks prior to the accident. This was evidence of constructive notice to the District in Mrs. Parker's suit, and it is argued that because her suit was against the District, and not against the District and the Gas Light Company, that therefore his testimony was inadmissible and did not establish constructive notice as against the Gas Light Company; but under the rule in Robbins *vs.* Chicago, *supra*, this is one of the very matters of which the judgment is conclusive.

III.

The District Was Not a Joint Tort Feasor with the Gas Light Company in Mrs. Parker's Case.

The charge of the learned trial justice, Cox (Rec., 42–43), distinctly and clearly left to the jury the question whether the injury resulted from a defective gas box or a defect in the sidewalk adjacent to the gas box. There is no foundation for the assertion that Mr. Justice Cox held that the verdict in the former suit was conclusive that the injury resulted from a defective gas box. Whether the verdict in the former suit would not be "conclusive" or "perfectly conclusive" that the gas box was the sole cause, was treated by the court in connection with a full recital of all the testimony that had been adduced at the former trial. But, as was observed by Mr. Justice James in delivering the opinion of the court below (20 D. C., foot p. 53), disposing of the objection to this